No. 9748

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

COUNTY OF ALAMEDA (a Body Corporate and Politic, and a Political Subdivision of the State of California),

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF

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SUBJECT INDEX

SUBJECT INDEX (Continued)

SUBJECT INDEX (Continued)

SUBJECT INDEX (Continued)

TABLE OF AUTHORITIES CITED

Cases

TABLE OF AUTHORITIES CITED (Continued)

TABLE OF AUTHORITIES CITED (Continued)

TABLE OF AUTHORITIES CITED (Continued)

TABLE OF AUTHORITIES CITED (Continued)

TABLE OF AUTHORITIES CITED (Continued)

TABLE OF AUTHORITIES CITED (Continued)

TABLE OF AUTHORITIES CITED (Continued)

TABLE OF AUTHORITIES CITED (Continued)

TABLE OF AUTHORITIES CITED (Continued)

CONSTITUTION OF THE UNITED STATES

CODE OF THE UNITED STATES

STATUTES OF THE UNITED STATES

CONSTITUTION OF THE STATE OF CALIFORNIA

CODES OF THE STATE OF CALIFORNIA

TEXT BOOKS AND OTHER AUTHORITIES

APPENDIX

INDEX

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JURISDICTION

The pleadings in the Southern Division of the United States District Court for the Northern District of California consisted of the Complaint for Declaratory Judgment filed by the Plaintiff The United States of America (Tr. 2-56), under the provisions of section 24 (1) (28 U.S.C.A. § 41 (1)) and section 274 (d) (28 U.S.C.A. § 400) of the Judicial Code, as amended, and the Answer of the Defen-

dant County of Alameda (Tr. 67-125), and of the Defendants Central Pacific Railway Company and Southern Pacific Company (Tr. 56-66).

This appeal from the Southern Division of the United States District Court for the Northern District of California, to the United States Circuit Court of Appeals for the Ninth Circuit is taken under the authority of section 128 of the Judicial Code, as amended (28 U.S.C.A. § 225) and in accordance with the provisions of Rule 73 (SCUS).

STATEMENT OF THE CASE

This is an appeal from a judgment rendered by the Southern Division of the United States for the Northern District of California in favor of the United States and against the County of Alameda in an action whereby the Government sought a declaratory judgment to determine the validity of an alleged contract made and entered into by and between the parties thereto and for a decree of specific performance to compel the County of Alameda to forever spend its public moneys to perpetually operate, maintain, repair and rebuild the Fruitvale Avenue Bridge for the free and continuous use and benefit of a private railroad company. Said bridge is a combination vehicular, railroad and pedestrian bridge built and owned by the United States and resting upon and crossing the property of the Government.

The alleged contract was evidenced by the resolution of the board of supervisors of Alameda County adopted December 6, 1909 (Appendix p. xl), a license dated Sep-

tember 3, 1910 issued by the Secretary of War and revocable at will, for the County of Alameda to assume control of the High Street, Park Street and Fruitvale Avenue Bridges (Appendix p. xlii), and the resolution adopted by the board of supervisors of said county on November 10, 1913 (Appendix p. xliv). The County of Alameda contended that the said alleged contract was *ultra vires* and void for a number of reasons hereinafter discussed and that the said county never had been, and is not now estopped to deny the validity of the same.

On October 21, 1940 the United States District Court made and entered its decree wherein it ordered, adjudged and decreed that the County of Alameda and the United States entered into a valid, binding contract under which the said county became obligated to operate, maintain, repair and rebuild the Fruitvale Avenue Bridge at its sole cost and expense and that the United States and the private railroad companies were relieved of all liability in respect thereto, and that the County of Alameda is now estopped to deny or question the validity of said contract (Appendix p. xxii).

Thereafter the County of Alameda perfected its appeal to the United States Circuit Court of Appeals for the Ninth Circuit under Rule 73.

QUESTIONS INVOLVED

I.

Does the County of Alameda or its board of supervisors now have, or has it ever had authority to operate, maintain, repair or rebuild said Fruitvale Avenue Bridge?

II.

Did not the contract between the County of Alameda and the United States violate section 18 of article XI of the Constitution of the State of California forbidding a county to incur any indebtedness or liability exceeding in any year the income and revenue provided for such year?

III.

Are not the expenditures made by the County of Alameda to operate and maintain the Fruitvale Avenue Bridge gifts of public money to a private corporation or to the United States, prohibited by section 31, article IV, of the California Constitution and the "due process" clause of the United States Constitution?

IV.

Is not the alleged contract between the United States and the County of Alameda *ultra vires* and void because it is an attempt to forever bind said county to perform the obligations set forth therein and/or was not said alleged contract terminated after a reasonable time, to wit, twenty-seven years, and/or was not said alleged contract terminable at the will of either party?

V.

Has Congress now, or has it ever had power to authorize the County of Alameda to operate, maintain, repair or rebuild the Fruitvale Avenue Bridge?

VI.

Is the County of Alameda now, or has it ever been estopped to set aside the alleged contract which was *ultra vires* and void?

VII.

Is not the alleged contract between the United States and the County of Alameda void for lack of mutuality?

VIII.

Is not the alleged contract between the United States and the County of Alameda void for uncertainty?

IX.

Was not the United States District Court bound by the interpretation of the constitutional and statutory provisions and by the case law of the State of California as set forth by the District Court of Appeal of that state in the case of *County of Alameda* v. *Ross,* 32 Cal. App. (2d) 135, 89 P. (2d) 460?

X.

Will equity decree specific performance of an alleged contract which is oppressive, unjust and unconscionable?

XI.

Should not the counterclaim of the County of Alameda have been allowed and the said county have its costs expended in this action?

XII.

Did not the District Court of the United States err in finding that the Tidal Canal was not open to navigation and that on June 3, 1913 the United States opened said canal to navigation, and in refusing to admit in evidence the testimony of Major Mendell given in the case of *United States* v. *Crooks, et al.?*

XIII.

Did not the District Court of the United States also err in not further finding the following facts:

1. That the harbor lines were revocable at will by the Secretary of War and were in fact revoked by him in 1929;

2. That the permission given to adjacent property owners to occupy the strip along the canal for the construction

of wharves and warehouses was without special lease of any kind and was expressly revocable by the Government;

3. That in *County of Alameda* v. *Ross,* 32 Cal. App. (2d) 135, 89 P. (2d) 460, the District Court of Appeal had before it the resolution of the board of supervisors of the County of Alameda of November 10, 1913, which incorporated the resolution of said board of December 6, 1909; and

4. That the United States was notified by the District Attorney of the County of Alameda, as counsel for the County of Alameda, of the filing of the "Petition for Writ of Mandate" in said action and that copies of all papers filed in said action by both petitioner and respondent, including the stipulation of facts and all briefs, were sent to and received by the United States Attorney in San Francisco during the proceedings and before the case was submitted?

XIV.

Did not the District Court of the United States err in ordering that judgment be entered in favor of the United States on "Findings of Fact and Conclusions of Law" and particularly on the conclusion of law contained in paragraph I of "Conclusions of Law" which reads "That the County of Alameda and the United States entered into a valid, binding contract as evidenced by the resolution adopted by the board of supervisors of said county on December 6, 1909; by the license issued by the Secretary of War on September 3, 1910; and the resolution adopted by the board of supervisors of said county on November 10, 1913" and the conclusion of law contained in paragraph II of "Conclusions of Law" which reads "That under said contract the said County of Alameda was obligated to maintain, operate, repair and rebuild said Fruitvale Avenue Bridge"?

SPECIFICATION OF ERRORS

The following is the specification of errors relied upon by the appellant County of Alameda in this appeal:

I.

The conclusion of law contained in paragraph IV of "Conclusions of Law" that "The County of Alameda had and has authority to operate, maintain, repair or rebuild the Fruitvale Avenue Bridge" is erroneous and the court should have concluded as a matter of law that neither the County of Alameda nor its board of supervisors now has or ever has had the authority to operate, maintain, repair or rebuild the said Fruitvale Avenue Bridge (Appendix p. xxxi).

II.

The conclusion of law contained in paragraph VII of "Conclusions of Law" that "The contract between the County of Alameda and the United States does not violate section 18 of article XI of the Constitution of California forbidding a county to incur any indebtedness or liability exceeding in any year the income and revenue provided for such year" is erroneous and the court should have concluded as a matter of law that the alleged contract between the County of Alameda and the United States violated said section of the Constitution (Appendix p. xxxiii).

III.

That the conclusion of law contained in paragraph VI of "Conclusions of Law" that "The expenditures made by the County of Alameda to operate and maintain the Fruitvale Avenue Bridge were and are not gifts to a private corporation of public money prohibited by section 31 of article IV of the California Constitution" is erroneous and the court should have concluded as a matter of law that the expenditures made by the County of Alameda to operate and maintain the Fruitvale Avenue Bridge are and always have been gifts of public money or things of value to individuals and municipal or other corporations, prohibited

by section 31 of article IV of the Constitution of the State of California and violative of the Fourteenth Amendment of the Constitution of the United States (Appendix p. xxxii).

IV.

The court erred in not concluding as a matter of law that the alleged contract between the United States and the County of Alameda, not specifying any time for which said county was bound to operate, maintain, repair and if necessary rebuild the Fruitvale Avenue Bridge, was contrary to public policy and void and/or was substantially complied with after a reasonable time and/or was terminable at the will of either party (Appendix p. xxxvi).

V.

The conclusion of law contained in paragraph V of "Conclusions of Law" that "Congress had and has power to authorize the county to operate, maintain, repair and rebuild the Fruitvale Avenue Bridge" is erroneous and the court should have concluded as a matter of law that the Congress of the United States has not now, and never has had the power to authorize said County of Alameda to operate, maintain, repair or rebuild said Fruitvale Avenue Bridge (Appendix p. xxxii).

VI.

The conclusion of law contained in paragraph III of "Conclusions of Law" that "The County of Alameda is now estopped to set aside its contract with the United States to maintain, operate, repair and rebuild Fruitvale Avenue Bridge" is erroneous and the court should have concluded as a matter of law that the alleged contract was *ultra vires* and that the said County of Alameda is not now and never has been estopped to set aside said alleged contract (Appendix p. xxxi).

VII.

The conclusion of law contained in paragraph VIII of

"Conclusions of Law" that "The contract between the United States and the County of Alameda is not void for lack of mutuality" is erroneous and the court should have concluded as a matter of law that the alleged contract between the United States and the County of Alameda was void for lack of mutuality (Appendix p. xxxiii).

VIII.

The conclusion of law contained in paragraph IX of "Conclusions of Law" that "The contract between the United States and the County of Alameda is not void for uncertainty" is erroneous and the court should have concluded as a matter of law that the alleged contract was void for uncertainty and should have refused specific performance of the same (Appendix p. xxxiv).

IX.

The conclusion of law contained in paragraph X of "Conclusions of Law" that "The courts of the State of California had no jurisdiction to determine substantial rights of the United States in *County of Alameda* v. *Ross,* 32 Cal. App. (2d) 135, 89 P. (2d) 460" is erroneous and the court should have concluded as a matter of law that the decision of the District Court of Appeal of the State of California in the matter of *County of Alameda* v. *Ross, supra,* interpreting the statutes, constitutional provisions and case law of said state in regard to the powers of the board of supervisors and counties of said state, was binding upon the United States District Court in the present action and that said court was without authority to interpret said statutes, constitutional provisions and substantive law contray thereto (Appendix p. xxxiv).

X.

The court erred in not concluding as a matter of law that equity will not decree specific performance of an alleged contract which is oppressive, unjust and unconscionable (Appendix p. xxxvi).

XI.

The conclusion of law contained in paragraph XII of "Conclusions of Law" which reads "That the counter claim of the defendant County of Alameda be dismissed and said defendant county take nothing thereby" is erroneous and the court should have concluded as a matter of law that the counter claim of the defendant County of Alameda be allowed and that the said county have its costs expended in this proceeding (Appendix p. xxxv).

XII.

The fact set forth in paragraph V of the Findings of Fact which read: "The Tidal Canal was not open to navigation" (Tr. 252) is erroneous and the court should have found in lieu thereof that the Tidal Canal was navigable in fact (Appendix p. xxv).

XIII.

The fact set forth in paragraph XI of the Findings of Fact which read: "On June 3, 1913, the United States opened the Tidal Canal to navigation, established harbor lines, and made available to adjacent property owners a twenty-five foot strip of property along each side of the Canal for the construction of wharves and warehouses" (Tr. 263) is erroneous and the court should have found in lieu thereof that prior to June 3, 1913 the Tidal Canal was open to navigation (Appendix p. xxvi).

XIV.

The court erred in refusing to admit in evidence the testimony of the witness, Major G. H. Mendell, given in the case of *United States* v. *Crooks et al.* Over the objection of appellant that the report of 1874 was irrelevant and immaterial and should not be admitted unless the testimony of Mendell in the *Crooks* case was likewise admitted (Tr. 335, 337-339) the district court admitted said report in evidence (Tr. 350) and rejected appellant's offer of said testimony (Tr. 202-203), the substance of said testimony

being that it was intended that the Tidal Canal would be navigable (Appendix p. xxxvi; Tr. 180-196, 338, 342).

XV.

The court erred in refusing to admit evidence of the fact that the said Major Mendell was deceased prior to the commencement of the proceeding now before this court and during his lifetime was the same party named as defendant in *United States* v. *Crooks et al* (Appendix p. xxxvii; Tr. 198-199).

XVI.

The court erred in not finding the following facts:

1. That the harbor lines were revocable at will by the Secretary of War and were in fact revoked by him in 1929 (Tr. 134-135, 170-172, 238, 446);

2. That the permission given to adjacent property owners to occupy the strip along the canal for the construction of wharves and warehouses was without special lease of any kind and was expressly revocable by the Government (Tr. 238-239, 379);

3. That in *County of Alameda* v. *Ross,* 32 Cal. App. (2d) 135, 89 P. (2d) 460, the District Court of Appeal had before it the resolution of the board of supervisors of the County of Alameda of November 10, 1913, which incorporated the resolution of said board of December 6, 1909 (Tr. 239); and

4. That the United States was notified by the District Attorney of the County of Alameda, as counsel for the County of Alameda, of the filing of the "Petition for Writ of Mandate" in said action and that copies of all papers filed in said action by both petitioner and respondent, including the stipulation of facts and all briefs, were sent to and received by the United States Attorney in San Francisco during the proceedings and before the case was submitted (Tr. 142, 239-240).

XVII.

The court erred in ordering judgment to be entered in favor of the United States on "Findings of Fact and Conclusions of Law" and particularly on the conclusion of law contained in paragraph I of "Conclusions of Law" which reads "That the County of Alameda and the United States entered into a valid, binding contract as evidenced by the resolution adopted by the board of supervisors of said county on December 6, 1909; by the license issued by the Secretary of War on September 3, 1910; and the resolution adopted by the board of supervisors of said county on November 10, 1913" and the conclusions of law contained in paragraph II of "Conclusions of Law" which reads "That under said contract the said County of Alameda was obligated to maintain, operate, repair and rebuild said Fruitvale Avenue Bridge."

STATEMENT OF FACTS.

The appellant is the County of Alameda, a political subdivision of the State of California, and the appellee is the United States. The Central Pacific Railway Company, the successor to the Central Pacific Railroad Company, and its lessee the Southern Pacific Company are private railroad corporations (Tr. 127, 246, 247) owning a railroad right of way over the Fruitvale Avenue Bridge.

The cities of Alameda and Oakland are both located in the County of Alameda on the east shore of San Francisco Bay, a navigable body of water. Said cities are separated from one another by a navigable Tidal Canal approximately two miles in length, three hundred and fifty feet in width, and connecting an inner harbor with San Leandro Bay, both the latter being navigable and connected with San Francisco Bay (Tr. 127-128, 247-248).

In 1874 Congress appropriated $100,000 for the improvement of Oakland Harbor (Tr. 129, 249) and in 1876 the United States instituted a condemnation proceeding in

what is now the Superior Court of California in the County of Alameda, herein referred to as *United States* v. *Crooks, et al.,* to acquire a right of way for the Tidal Canal, and sought to condemn rights of the County of Alameda in highways and of the Central Pacific Railroad Company in railroad rights of way which crossed the proposed Tidal Canal where the bridges are now located (Tr. 129-130, 249). These defendants asked for no damages and the decree ordered the United States at its own expense to construct and keep in repair suitable bridges and railroad bridges on the highways and railroads crossing the proposed canal (Tr. 130-131, 160, 165, 250).

The United States completed the construction of the Tidal Canal in 1903 to an average depth of from eight to ten feet (Tr. 132, 250, 251) to turn the water from San Leandro Bay through a tidal canal into an estuary, so as to increase the tidal canal flow through said estuary, for the purpose of removing the sediment from the same and affording a deeper entance to said San Leandro Bay through the estuary and the Canal, all in the interest of commerce and navigation on the east side of San Francisco Bay (Tr. 129, 248). The appellant contends that the Canal was intended to be and was navigable both in fact and in law for many years prior to 1913.

The United States constructed and until November 17, 1913 maintained and operated highway drawbridges at Park and High Streets, with a clearance below of thirteen feet three inches, and a combination railroad, vehicular and pedestrian drawbridge at Fruitvale Avenue with a clearance below of twelve feet eight inches. For many years prior to 1913 barges and scows plied up and down said Tidal Canal and the bridges were opened and closed on occasions with hand operated machinery by the United States as well as by private interests to permit passage of vessels which could not clear the bridges (Tr. 131-132,

251-252). Prior to 1913 it took approximately thirty minutes to open and thirty minutes to close each of said bridges. After electrification it took two to three minutes to open and the same to close each bridge (Tr. 132, 251).

In 1910 a harbor line survey was made for San Francisco Bay area by the United States. A survey made prior to 1876 in connection with the condemnation action of *United States* v. *Crooks, et al.,* was used in the preparation of the map of the harbor lines of the Tidal Canal (Tr. 379, 391, 404, 417, 418). The area between pierhead and bulkhead lines was made available for use by adjoining property owners at the pleasure of the United States and without special lease of any kind (Tr. 379). The harbor lines were revocable at will and were in fact revoked by the Secretary of War in 1929 by moving the pierhead lines back to the bulkhead lines (Tr. 446).

On December 6, 1909 the board of supervisors of the County of Alameda adopted a resolution proposing that if the United States Government wuld turn over these bridges to the County, said county would accept the same and assume all costs of their future repair, operation and replacement, provided that each of them should be equipped to be operated by electricity and that the United States should under such terms and conditions as it saw fit, lease the water front in the Tidal Canal and establish harbor lines to permit the construction of wharves and docks (Appendix p. xl; Tr. 134, 167, 253).

On September 3, 1910, allegedly acting under a Congressional Act, the Secretary of War issued a revocable license to the county to assume the control, maintenance, repair and the rebuilding of said bridges, the United States to install the electrical equipment (Appendix p. xlii; Tr. 134, 170, 256).

On November 10, 1913 said board of supervisors adopted a resolution accepting said revocable license (Appendix dix p. xliv; Tr. 134, 167, 253).

The electrical equipment was later installed by the United States at a total cost of $21,358.80 (Tr. 135, 263).

Thereafter the bridges were operated, maintained and repaired by the county at a cost of $703,066.45 (Tr. 136, 137, 264). The cost to the county of operating, maintaining and repairing the Fruitvale Avenue Bridge is approximately $1,000 per month and the estimated cost of rebuilding this bridge is $1,250,000 (Tr. 136, 137, 264-265). The total cost thus expended has exceeded the income and revenues provided for the fiscal year 1913-14 or any fiscal year prior thereto (Tr. 137, 265).

The tracks and right of way of the Central Pacific Railway Company and its lessee, the Southern Pacific Company, are and were at all times permanent, integral and inseparable parts of the Fruitvale Avenue Bridge which is constantly used by said private railroad corporations free of cost for the transit of railroad traffic (Tr. 138, 266).

Between the years 1890-1930 the population of Alameda County increased in excess of five-fold; between the years 1880-1930 the population of the City of Alameda increased in excess of six-fold and the population of the City of Oakland increased in excess of eight-fold (Tr. 139, 140, 267, 268). The Fruitvale Avenue Bridge carries the only railroad traffic to and from the City of Alameda wherein the United States Naval Base is now located.

County of Alameda v. *Ross,* 32 Cal. App. (2d) 135, 89 P. (2d) 460, was a mandamus proceeding brought by the County of Alameda against its auditor to determine the validity of the alleged constract between the United States and the County of Alameda. The court held that the alleged license agreement was *ultra vires* and void (Tr. 141, 269). Thereafter the county notified the United States that it would cease to operate said Fruitvale Avenue Bridge and referred to the decision of *County of Alameda* v. *Ross,* (Tr. 140, 176, 268). The private railroad corporations

served notice on the United States requesting that it comply with the decree in the *Crooks* case and cause the Fruitvale Avenue Bridge to be inspected, maintained and renewed (Tr. 141, 178, 268). Immediately thereafter the United States Governmment instituted these proceedings in the United States District Court for the Northern District of California, Southern Division.

ARGUMENT OF THE CASE.

I.

THE CONCLUSION OF LAW CONTAINED IN PARAGRAPH IV OF "CONCLUSIONS OF LAW" THAT "THE COUNTY OF ALAMEDA HAD AND HAS AUTHORITY TO OPERATE, MAINTAIN, REPAIR OR REBUILD THE FRUITVALE AVENUE BRIDGE" IS ERRONEOUS AND THE COURT SHOULD HAVE CONCLUDED AS A MATTER OF LAW THAT NEITHER THE COUNTY OF ALAMEDA NOR ITS BOARD OF SUPERVISORS NOW HAS OR EVER HAS HAD THE AUTHORITY TO OPERATE, MAINTAIN, REPAIR OR REBUILD THE SAID FRUITVALE AVENUE BRIDGE (APPENDIX p. xxxi).

There was not and is not now any constitutional, statutory, charter or any other authorization whatever, either express or implied, authorizing the board of supervisors to bind the County of Alameda to forever ". . . maintain these bridges, attending to all necessary repairs, and rebuilding same if at any time burned, destroyed, or become inadequate for the purpose they serve. . .", said alleged license agreement being expressly revocable at the will of the Secertary of War (Tr. 172, 174, 134, 135).

Furthermore the Fruitvale Avenue Bridge as well as the land beneath it and on which it rests has at all times been, and now is the property of the United States.

Pursuant to the authorities hereinafter set forth, said alleged license agreement was, and is *ultra vires* and void, and the following California authorities alone are conclusive of this issue.

A county is a body corporate and politic and as such has only the powers specified by statute except such other powers as are necessarily implied from those expressed.

Cal. Pol. Code § 4000;

Simpson v. *Payne,* 79 Cal. App. 780, 785, 251 Pac. 324, 326.

These powers can be exercised only by the board of supervisors or by agents and officers acting under their authority.

Cal. Pol. Code § 4001;

Contra Costa County v. *Soto,* 138 Cal. 57, 70 Pac. 1019.

Boards of supervisors are creatures of statute and the authority for any act on their part must be sought in statutes. Any action of a board of supervisors which is not within the scope of its powers, either express or implied, is illegal, *ultra vires* and of no effect.

In *County of Modoc* v. *Spencer,* 103 Cal. 498, 37 Pac. 483, the Supreme Court of the State of California held that under the County Government Act, boards of supervisors had no power to employ counsel to prosecute criminal cases and such employment, being without authority, was void and created no legal claim against the county.

In *Sutro* v. *Pettit,* 74 Cal. 332, 16 Pac. 7, the Supreme Court held that county bonds issued under an act authorizing their issuance not exceeding a stated amount were void in so far as they exceeded such amount, even in the hands of a bona fide purchaser for value and before maturity. The court pointed out that having been issued without authority, the bonds were void.

In 18 California Jurisprudence, page 798, it is said:

"The rule is so familiar as to be trite that a municipal corporation can exercise only such powers as have been conferred upon it in its charter, some constitutional provision or general law; . . ."

The California decisions support this well established

doctrine as seen in *Frisbee* v. *O'Connor,* 119 Cal. App. 601, 603, 7 P. (2d) 316, 317, wherein the court stated:

> ". . . The well-settled rule by which the powers of a municipal corporation are to be measured is stated in 1 Dillon on Municipal Corporations, fifth edition, Section 237, as follows: 'It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation—not simply convenient, but indispensable. Any fair, reasonable, substantial doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied. Of every municipal corporation the charter or statute by which it is created is its organic act. Neither the corporation nor its officers can do any act, or make any contract, or incur any liability, not authorized thereby, or by some legislative act applicable thereto. All acts beyond the scope of the powers granted are void.' Approval of this rule is found in a long line of decisions in this state. (*Miller* v. *City of Los Angeles,* 185 Cal. 440 [197 Pac. 342]). . ." (and other California Supreme Court citations).

In the decision of *In Re City and County of San Francisco* v. *Boyle,* 195 Cal. 426, 434, 233 Pac. 965, 968, the State Supreme Court said:

> ". . . But as this court has already said in the Egan case, 'However worthy the motive, however advantageous to the public the result sought to be attained, it must always be remembered that municipal corporations are public bodies of limited powers; and that the validity of their acts must be judged by an examination of the charter or law defining their powers rather than by a view of the purposes or results of those acts.' . . ." [1]

1. Accord: *Hurst* v. *City of Burlingame,* 207 Cal. 134, 138, 277 Pac. 308, 310; and *Fessler* v. *Campbell,* 2 Cal. (2d) 638, 644, 42 P. (2d) 1020, 1022.

The principles of law hereinbefore discussed are also similarly well established throughout the United States.

In 20 Corpus Juris Secundum, *Counties,* § 174, pages 1006-1007, it is stated:

> "A county is not bound by a contract beyond the scope of its powers or foreign to its purposes, or which is outside the authority of the officers making it. In this connection it is the rule that the authority of a county board to make contracts is strictly limited to that conferred, either expressly or impliedly, by statute, regardless of benefit to the county or of value received; . . ." [2]

In 20 Corpus Juris Secundum, *Counties,* § 82, pages 849-851, it is said:

> "It is well settled that a county board possesses and can exercise such powers, and such powers only, as are expressly conferred on it by the constitution or statutes of the state, or such powers as arise by necessary implication from those expressly granted . . ." [3]

The same principles apply to cities.

43 Corpus Juris, *Municipal Corporations,* § 185, pp. 186-188;

1 McQuillin, *Municipal Corporations,* (2d Ed.), § 367, pp. 1003-1016; and

3 McQuillin, *Municipal Corporations,* (2d Ed.), § 1269, pp. 804-805.

We shall now discuss California decisions that definitely apply the foregoing principles of law to facts that are analogous to the issue now before this court.

In *Glass* v. *Ashbury,* 49 Cal. 571, 577, a state legislative act authorized the board of supervisors of the City and County of San Francisco to procure a training ship to instruct boys in seamanship, and to apply to the United States for the use of a vessel, and to accept the services of any officer whom the United States might detail to service

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2. (See also 15 Corpus Juris, *Counties,* § 233, pp. 540-541.)
3. (See also 15 Corpus Juris, *Counties,* § 103 p. 457.)

on the vessel upon such terms and conditions, consistent with the provisions of the Act, as the United States might prescribe. The board was also authorized to remove boys from the Industrial School to the ship, and designated courts could sentence or transfer boys to the ship. A Congressional Act authorized the Secretary of the Navy to furnish such a training ship provided "that no person shall be sentenced to or received at such schools as a punishment or commutation of punishment for crime". The ship and the services of a lieutenant-commander of the United States Navy were accepted, his bill for one month was allowed by the board of supervisors and the auditor refused to audit the same. In denying the application for a writ of mandate to compel the auditor to audit said bill, the Supreme Court of the State of California said:

> "It certainly requires no argument to show that the condition imposed by the Government of the United States, as found in the proviso, is utterly inconsistent with the provisions of the Act of the Legislature under which the Board is to act in accepting the ship. The provisions found in the Act of the Legislature cannot be enforced, except through a palpable disregard and violation of the terms of the proviso found in the Act of Congress. The former expressly authorizes the confinement on board the training ship of a certain class of offenders against the criminal laws of the State as a punishment or commutation of punishment for crimes of which they are or may be convicted, while, as we have seen, the latter expressly and in terms, prohibits it.
>
> "It would indeed be difficult to imagine a more palpable or irreconcilable inconsistency between the provisions of the Act of the Legislature and that of Congress than is here pointed out, and it results that until some change shall be effected in the provisions of one or the other of these acts, the Board can have no authority to accept the proffered training ship."

As in the foregoing case, "the Board can have no au-

thority to accept the" alleged license agreement now before this court, in that there is no authorization for such an agreement to be found in the state constitution, statutes or county charter, either expressed or implied.

In *Pacific Bridge Co.* v. *Kirkham,* 54 Cal. 558, 560, a state legislative act authorized the City of Oakland to construct a bridge across the estuary and levy assessments therefor. The act did not authorize the city to construct the bridge on private land. This was an action brought to enforce an assessment lien against defendant's land. The defense was made that the bridge in part rested on and passed over land which was private property, the right of way over which had never been granted to the City of Oakland. The Supreme Court of the State of California said:

> ". . . If this be true, it must be conceded, we think, on all sides, that the assessment cannot be enforced; for no one can be compelled to pay for an improvement of this nature which has been erected upon private property. The principle upon which such assessments are sustained is, that those required to pay will be benefited by the improvement and will have the use and enjoyment of it. But this benefit could not accrue if the improvement is erected on private property. In such case neither the public nor those assessed would be entitled to its use, and it might be abated at any time by the owner of the property . . ."

In the case now at issue, the board of supervisors was not authorized to agree to use county tax moneys to repair or rebuild the Fruitvale Avenue Bridge which was, and now is the property of the United States and which said bridge rests on land belonging to the United States. In accord with the foregoing case, the principle upon which tax moneys are expended for a public improvement is that those required to pay the same will be benefited by, and will have the use and enjoyment of the improvement. But

in this case the benefit might never accrue, as both the bridge and the land upon which it is located belong to the United States. In addition, the alleged license agreement was, and is revocable at the pleasure of the United States. Hence, as in the foregoing case, under such facts both the public and the taxpayers paying the bills could at any time be deprived of the benefit of such expenditures including the estimated cost of $1,250,000 for the replacement of this bridge. As was stated by the court in *Alameda County* v. *Ross,* 32 Cal. App. (2d) 135, 141, 89 P. (2d) 460, 462, 463:

> ". . . It is apparent from the terms of the license that the County of Alameda will soon be called upon to reconstruct the Fruitvale Avenue Bridge at an expense of approximately $1,250,000, immediately upon the completion of which the government may revoke the agreement, appropriate the benefits of the vast expenditure of money by the county, and resume its exclusive operation and control of the bridges. . ."

The foregoing decisions of the California courts compel the conclusion that such an alleged license agreement was *ultra vires* and void as being completely without the powers, either express or implied, of the board of supervisors and the County of Alameda.

Pursuant to the foregoing well-established principles of law, the court held the *alleged license agreement involved in the action now before this court to be invalid and void* in *County of Alameda* v. *Ross,* 32 Cal. App. (2d) 135, 146, 147, 89 P. (2d) 460, 465 (petition for hearing denied by the Supreme Court of the State of California). In said decision, among other things, the court said in this connection:

> "The County of Alameda is a body corporate and politic, possessing only such powers as are specifically granted to it by law, together with such other powers as may be necessarily implied therefrom. (Sec. 4000,

Pol. Code.) Any person contracting with a county or municipal corporation is bound to recognize such limitations of powers. (*Hurst* v. *City of Burlingame,* 207 Cal. 134, [277 Pac. 308]; *City and County of San Francisco* v. *Boyle,* 195 Cal. 426 [233 Pac. 965]; *Ellis Landing & Dock Co.* v. *City of Richmond,* 70 Cal. App. 702 [234 Pac. 336]; *Frisbie* v. *O'Connor,* 119 Cal. App. 601 [7 Pac. (2d) 316]; 18 Cal. Jur. 797, sec. 105; 1 McQuillin's Municipal Corp., 2d ed., p. 909, sec. 367.) Boards of supervisors are merely the agents of the county. (Sec. 4001, Pol. Code; *Contra Costa County* v. *Soto,* 138 Cal. 57 [70 Pac. 1019]; *County of Modoc* v. *Spencer,* 103 Cal. 498 [37 Pac. 483].) The powers of a board of supervisors with respect to incurring municipal indebtedness should be determined by a strict construction of the law. (*Hurst* v. *City of Burlingame,* supra; *Egan* v. *San Francisco,* 165 Cal. 576 [133 Pac. 294, Ann. Cas. 1915A, 754].) Quoting with approval from *Linden* v. *Case,* 46 Cal. 171, it is said in *County of Modoc* v. *Spencer,* supra, at page 502:

" 'It is settled in this state that no order made by a board of supervisors is valid or binding unless it is authorized by law. No claim against a county can be allowed, unless it be legally chargeable to the county; and if claims not legally chargeable to the county are allowed, neither the allowance nor the warrants drawn therefor create any legal liability'.

"Section 4005 of the Political Code provides that:

" 'All contracts, authorization, allowances, payments, and liabilities to pay, made or attempted to be made in violation of law, shall be absolutely void, and shall never be the foundation or basis of a claim against the treasury of such county. And all officers of said county are charged with notice of the condition of the treasury of said county, and the extent of the claims against the same.' "

Decisions throughout the United States are in accord with the well established law in California in this regard.

In *Minneapolis, St. P., R. & D. Electric Traction Co.* v. *City of Minneapolis,* 124 Minn. 351, 353, 354, 355, 145 N. W. 609, the Supreme Court of the State of Minnesota held that the city had no power to contract with a commercial railroad to bear part of the expense of strengthening a bridge which the railroad company desired to cross with its tracks where the bridge was already of sufficient strength to accommodate general travel. The court further held that a contract by which a municipality undertakes to assume an obligation properly resting on a railroad company to restore a road or street, to build a bridge or to maintain a bridge is wholly beyond the power of the city and such a contract is void.[4]

Similarly, the County of Alameda had no power to agree with the United States to bear all the expense of operating, maintaining, repairing and when necessary rebuilding the Fruitvale Avenue Bridge which is used for the transit of railroad traffic. (Tr. 138). Such an agreement undertook to assume an obligation ordinarily resting on a private railroad corporation, but here resting on the United States pursuant to the provisions of the condemnation decree in the action entitled *The United States* v. *Crooks, et al.,* (Tr. 131).

In *Jefferson County Fiscal Court* v. *Jefferson County,* 278 Ky. 785, 789, 790, 792, 129 S.W. (2d) 554, 556, 557, a county appealed from an order of a fiscal court appropriating county money to be expended to provide fire protection under a city contract for certain property partly owned by the county and partly owned by separate governmental agencies. The court stated that the petition was also in the nature of a petition in equity for a declaration of rights of the parties. The Supreme Court of the State of Kentucky quoted with approval from the trial court:

4. Accord: *City of Bloomington* v. *Chicago & A. R. Co.,* 134 Ill. 451, 457, 458, 26 N. E. 366, 367; and *State* v. *Minnesota Transfer Ry. Co.,* 80 Minn. 108, 115, 118, 83 N. W. 32, 35, 36.

"The contract is indivisible. It is impossible to allocate a portion, or percentage, of the gross fee of $7,500.00 to protection of County-owned buildings, and the balance to protection of buildings owned by the separate instrumentalities . . .

"Examining the question whether the County possesses power to provide such protection for the properties of the independent instrumentalities, it is to be observed that the Legislature has conferred power, express and implied, upon those separate corporate entities to acquire, hold, maintain and repair the properties owned by them. . . . The existence of this power in them would seem to militate against finding that the delegation of power has been duplicated by a like grant —by implication—to the County.

"It is my opinion that neither by expression nor necessary implication has the Legislature delegated power to the County to contract for fire protection services to be rendered with respect to the buildings owned and maintained by the independent governmental agencies as distinguished from those owned by the County itself . . .

". . .

". . . It is not being competent for the fiscal court to appropriate public monies for that purpose and the contract being indivisible, the order appealed from and the contract executed pursuant thereto are void."[5]

In the appeal before this court the alleged license agreement between the United States and the County of Alameda is also indivisible. It would be impossible to allocate a portion or percentage of the cost of operating, maintaining, repairing and when necessary rebuilding the Fruitvale Avenue Bridge to the County of Alameda for the vehicular and pedestrian use of this bridge and the balance to either the United States or the private railroad corporation for

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5. Accord: *City of Bay St. Louis* v. *Board of Sup'rs of Hancock County*, 80 Miss. 364, 32 So. 54; and *Borough of Henderson* v. *County Com'rs. of Sibley Co.*, 28 Minn. 515, 518, 519, 11 N. W. 91, 92, 93.

the use of transit of trains over said bridge, assuming for the sake of argument only that the alleged contract between the United States and the county was not void, illegal and unenforceable on several other grounds and that any portion of said expenditure was a legitimate county charge. This is particularly true by virtue of the fact that said bridge is a combination railroad, vehicular and pedestrian swing span drawbridge, built upon a single concrete center pier, together with the fact that the tracks and right of way of said private railroad corporation are and were at all times permanent, integral and inseparable parts of the Fruitvale Avenue Bridge as constructed. (Tr. 138).

However, whether the contract in the preceding case had been indivisible or not, the result would have been the same, as seen from the language in said case to the effect that neither by expression nor necessary implication had the legislature delegated power to the county to contract for fire protection with respect to buildings owned and maintained by independent governmental agencies, as distinguished from those owned by the county itself.

Likewise in the present case the County of Alameda could not contract with the United States, an independent governmental agency, to forever maintain, operate, repair and whenever necessary replace the Fruitvale Avenue Bridge in the absence of express authorization or necessary implication therefrom, and particularly where said bridge is *owned by the United States and is located on real property belonging to the United States.*

In *Wheeler* v. *City of Sault Ste. Marie,* 164 Mich. 338, 340, 341, 129 N.W. 685, 686, the complainant had conveyed a strip of land for the purpose of the city's widening a street, upon the agreement that the city would move back a building and pay him a certain amount of money. In

holding such contract *ultra vires* the Supreme Court of the State of Michigan said:

> "Another equally cogent reason suggests itself why the city could not legally enter into the proposed contract. By accepting the terms of the contract, it would undertake to carry a casualty risk during the time the building was being moved, and might subject the city to a great loss in the event that the building should collapse. It would likewise compel the city to carry a personal indemnity risk for the employes while engaged in the work. The carrying of casualty and indemnity risks for individuals or other corporations is clearly beyond the power of the defendant city. . ."

Hence clearly the County of Alameda did not have the power to enter into the alleged license agreement whereby it would have assumed the responsibility and burden of a private railroad corporation's continual use of the bridge with not only the greatly increased financial burden, but also the attendant casualty risk.

In *Board of Sup'rs of Apache County* v. *Udall,* 38 Ariz. 497, 506, 507, 508, 509, 1 P. (2d) 343, 347, 348, the county supervisors had attempted to enter into a contract with the United States whereby they were to secure at county expense a right of way over a road to be constructed by the United States and be maintained by it for two years, after which said road was to be maintained indefinitely by the county to the satisfaction of the United States at an estimated cost of $300 per mile. Taxpayers sought to enjoin the county supervisors from taking this action and alleged that the road referred to was not a county road but a federal road project. The Supreme Court of the State of Arizona said:

> "The real question before us is as to the power of a board of supervisors to enter into a contract of the nature described and to expend public funds in furtherance thereof. The only powers possessed by boards of

supervisors are those expressly conferred by statute or necessarily implied therefrom . . . We must then examine the statutes to find what powers boards of supervisors have in connection with matters such as those above set forth."

A statute provided:

". . . The board of supervisors, under such limitations and restrictions as are prescribed by law, may: . . . 4. lay out, maintain, control and manage public roads, ferries and bridges within the county and levy such tax therefor as authorized by law . . ."

The court affirmed the judgment for plaintiffs and said:

". . . It will be observed that the power of the supervisors under this section is confined to 'public roads, ferries and bridges within the county,' and since the power includes the control and management of such roads, we think it but reasonable to assume that the public roads referred to therein must be public county highways, as distinct from state or federal highways, or other public roads, which cannot be controlled or managed by the supervisors . . .

"We conclude, therefore, that boards of supervisors have no right to spend county funds on any road except a county public highway or state route, established as provided in section . . . and then only when such highways are under the exclusive control and management of the supervisors at all times . . ."

The court then stated:

". . . If, on the other hand, the road be a state route, *the supervisors certainly cannot bind themselves to maintain perpetually a road which may be removed from their jurisdiction at any time by the highway commission.*" (Emphasis added.)

It would clearly appear from the foregoing decision that a county not empowered to spend county funds on a federal road is also precluded from spending county funds on a federal bridge.

Pursuant to the foregoing authorities and discussion it

is submitted that there was not, nor is there now any constitutional, statutory or charter provision whatever, whereby the County of Alameda or its board of supervisors was either expressly or impliedly authorized or empowered to enter into, become a party to, or be bound by the alleged license agreement, revocable solely at the pleasure of the United States. Such an alleged license agreement was *ultra vires* and void.

II.

THE CONCLUSION OF LAW CONTAINED IN PARAGRAPH VII OF "CONCLUSIONS OF LAW" THAT "THE CONTRACT BETWEEN THE COUNTY OF ALAMEDA AND THE UNITED STATES DOES NOT VIOLATE SECTION 18 OF ARTICLE XI OF THE CONSTITUTION OF CALIFORNIA FORBIDDING A COUNTY TO INCUR ANY INDEBTEDNESS OR LIABILITY EXCEEDING IN ANY YEAR THE INCOME AND REVENUE PROVIDED FOR SUCH YEAR" IS ERRONEOUS AND THE COURT SHOULD HAVE CONCLUDED AS A MATTER OF LAW THAT THE ALLEGED CONTRACT BETWEEN THE COUNTY OF ALAMEDA AND THE UNITED STATES VIOLATED SAID SECTION OF THE CONSTITUTION (APPENDIX p. xxxiii).

In so far as pertinent, section 18 of article XI of the constitution of the State of California reads as follows:

> "No county, city, town, township, board of education, or school district, shall incur any indebtedness or liability in any manner or for any purpose exceeding in any year the income and revenue provided for such year, without the assent of two-thirds of the qualified electors thereof, voting at an election to be held for that purpose. . ."

Section 4071 of the Political Code of the State of California restates the prohibition contained in the foregoing section of the constitution, and further provides that "Any debts or liabilities contracted in any manner or for any purpose and any allowances made contrary to the provisions of this section shall be null and void and the auditor

shall not draw his warrant therefor nor the treasurer pay the same."

In the early case of *Bradford* v. *San Francisco,* 112 Cal. 537, 545, 44 Pac. 912, 914, the court in construing section 18 of article XI of the constitution said:

> ". . . It is couched in language so plain and explicit as not to be misunderstood or to leave room for judicial interpretation or other inference than that naturally and irresistibly deducible therefrom."

The United States Supreme Court in the case of *District Township of Doon* v. *Cummins,* 142 U. S. 366, 371, 35 L. ed. 1044, 1046, 12 Sup. Ct. 220, 221, in construing a similar section of the Colorado constitution stated:

> "The scope and meaning of this provision of the fundamental and paramount law of the state are clear and unmistakable. No municipal corporations 'shall be allowed' to contract debts beyond the constitutional limit. When that limit has been reached, no debt can be contracted 'in any manner, or for any purpose.' . . ." [6]

The cases uniformly hold that the test to be applied in the determination of whether the debt or liability is in contravention of the constitutional provision, is whether the proposed expenditure, added to all other obligations to which the county had been previously committed, exceeds the income and revenue for the year in which the proposed debt was incurred or the proposed liability assumed.

The Government stipulated and the court found that the total cost of operating, maintaining and repairing the bridges from 1913 to date, namely, the sum of $703,066.45, exceeded the income and revenue provided for the fiscal year 1913-1914 or any fiscal year prior thereto and said expenditure was not assented to by a two-thirds vote of the qualified electors of the County of Alameda voting at

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6. Accord: *Litchfield* v. *Ballou,* 114 U. S. 190, 192, 29 L. ed. 132, 133, 5 Sup. Ct. 820, 821; *Buchanan* v. *Litchfield,* 102 U. S. 278, 287, 26 L. ed. 138, 139; *Mayer* v. *J. T. Jones & Sons,* 113 Okla. 119, 239 Pac. 904, 905; and *Payne* v. *City of Covington,* 276 Ky. 380, 382-390, 123 S.W. (2d) 1045, 1046.

an election held for that purpose (Tr. 137, 264, 265). The sum of $703,000 is only an infinitesimal part of what the total cost of operating, maintaining or repairing said bridge or bridges will be, if this contract binds the County to continue this obligation *ad infinitum,* as the Government contends it does.

It has likewise been stipulated that the cost of replacing the Fruitvale Avenue Bridge was estimated to be approximately one and a quarter million dollars (Tr. 137, 265). One replacement of the bridge would not satisfy the demands of a perpetual contract; yet, since it is stipulated that the sum of $703,000 exceeded the income and revenue for the fiscal year 1913-1914 or any year prior thereto, it must therefore be conceded that the income of any one of said years would have been insufficient to meet the cost of a single replacement.

From these facts it would appear that the alleged agreement between the United States Government and the County of Alameda violated section 18 of article XI of the California constitution and was *ultra vires* and void.

As has heretofore been pointed out in section I of this brief, political subdivisions of the state have only such powers as are expressly conferred upon them by the constitution and statutes of the state. In determining the extent of, or limitation upon such powers, federal courts are bound by the construction of the state constitution and statutes as interpreted by the courts of that particular state (App. Br. 102-107).

In order to understand the decisions of the courts of this state regarding section 18 of article XI of the constitution, it is necessary to discuss and distinguish the early case of *McBean* v. *City of Fresno,* 112 Cal. 159, 167, 44 Pac. 358, 360. The city of Fresno had entered into a contract whereby the plaintiff agreed to dispose of the sewage of the city for a period of five years for the sum of $49,-

000 per year. For three years both parties complied with the contract; in the fourth year the city refused to perform upon the ground that the contract violated section 18 of article XI of the state constitution and was therefore void.

The Supreme Court stated that the intent of the constitutional provision was to protect municipalities of the state from the great and ever growing evil to which they were subjected "by the creation of a debt in one year, which debt was not, and was not expected to be, paid out of the revenues of that year, but was carried on into succeeding years, increasing like a rolling snowball as it went, until the burden of it became almost unbearable upon the taxpayers". However, the court was so impressed by the health problem of properly disposing of the sewage of the city that it finally concluded that the contract under consideration did not violate section 18 of article XI of the constitution and rationalized its decision by saying:

> ". . . When it is come to consider the contractual relations between the city and appellant, it is at once seen that the city cannot be liable in any one year for more than four thousand nine hundred dollars, an amount far within the revenue derived to the sewer fund; and, further, that it cannot become liable for this amount at all until faithful service rendered by the contractor each year . . .
>
> ". . . We base our views upon the conviction that, at the time of entering into the contract, no debt or liability is created for the aggregate amount of the installments to be paid under the contract, but that the sole debt or liability created is that which arises from year to year in separate amounts as the work is performed."

The courts of California and other states have recognized the fact that the decision of the *McBean* case was the result of an attempt to do equity and to protect the health of the city and have limited the application of the rule there enunciated to similar situations.

The Supreme Court of Idaho in the case of *Boise Development Co.* v. *City of Boise,* 26 Idaho 347, 361, 143 Pac. 531, 535, in referring to the *McBean* case stated:

> ". . . This was a case where the court, no doubt, had strong equitable grounds in favor of the validity of the contract upon which the action was based. . . . there was an urgent necessity for the city to make some arrangements to dispose of its sewage at once. The quarterly expense was small, and the price was probably very reasonable. Moreover, the charter of the city authorized the levying and collection of a tax not exceeding 10 cents on each $100 for a sewer fund, and it was conceded that the tax which would be collected for that fund was ample to meet all sums that might be needed to pay McBean under said contract. Because of the merit of the contract and the pressing necessity for some means to take care of the sewage of the city, we believe the better judgment of the court was somewhat biased by its desire to actually benefit the people of the city. In fact, as a matter of public policy, the execution of this contract might well be justified. But when the court attempts by argument to escape the force and effect of the constitutional provision under consideration and show that the city incurred no *liability* under the contract, we submit that its reasoning is not sound. . . ."

The California courts in refusing to enlarge the doctrine of the *McBean* case have clearly distinguished the cases where the liability is not created at the time of the execution of the agreement but comes into being each year as the services are rendered or the materials furnished, as in that case, and the cases where the consideration on the other side is fully furnished at the time of the transaction and the debt is created at once, the time of payment only being postponed.

If the theory of the appellee is correct that the electrification of the bridges, the establishment of the harbor lines

and making available for use the abutting land was the consideration for the execution of the alleged agreement, then the instant case clearly falls within the latter category, otherwise the appellee is driven to the position of conceding that the revocable license to control the bridges was the consideration for the alleged agreement and that therefore the agreement failed for lack of mutuality. Conceding for the sake of argument only that the appellant's theory of what constituted the consideration for the execution of the agreement is correct, then the agreement violated section 18 of article XI of the constitution as interpreted by the California courts and was therefore void.

In the case of *Chester* v. *Carmichael,* 187 Cal. 287, 290, 291, 292, 293, 294, 201 Pac. 925, 926, 927, 928 the grantors deeded to the city of Sacramento lands for park purposes subject to certain conditions subsequent to the effect that the city must expend $5,000 annually in the improvement of the park, the total cost of such improvement to be about $50,000. The plaintiff, a taxpayer, sought an injunction prohibiting the city of Sacramento and its officers from carrying out the provisions of the deed and to have such deed declared void on the theory that such action on the part of the city would be in violation of section 18 of article XI of the constitution.

The following language of the court interpreting this section of the constitution is directly in point in the instant case:

> ". . . The obligation created by the contract is one in favor and for the benefit of the grantors, who have fully executed their part by the conveyance and delivery of the property, . . . By means of conditions subsequent expressed in the deed, the property conveyed was practically pledged to the grantors as security for the performance of the undertaking, the title to revert to them, their successors or assigns, in the event of nonperformance, if they so elect. It may

be assumed that the city cannot be held liable in damages for failure to carry out this contract, or specifically compelled to perform, and that the only penalty for failure to perform is the reversion of the property to the grantors, their successors or assigns. This being the situation, the question is whether the transaction, the giving and acceptance by the city of the deed, involved the incurring by the city of 'any indebtedness or liability in any manner or for any purpose' . . . within the meaning of section 18 of article XI of our constitution. If it did, admittedly, in the light of the facts alleged in the complaint, the liability exceeded the income and revenue provided for the year 1919, the year in which the transaction was had.

"Assuming the validity of the transaction between the parties apart from any question as to the effect of the constitutional provision, it seems clear that an obligation was imposed thereby upon the city, in favor of the grantors, their successors and assigns, to expend in the specified work at least five thousand dollars per annum for a period of years and until the completion thereof. To this extent the income and revenue of future years was attempted to be appropriated for the performance of this obligation in favor of the grantors, an obligation assumed by the city in consideration of the transfer to it of the property. Assuming the complete carrying out of its part of the agreement by the city, there will have been such an appropriation. The doing of this work, with a prescribed minimum expenditure therefor each year, was, as we have said, the purchase price for the land, payable in yearly installments, the grantors having fully performed their part by conveyance and delivery of the land. . . .

". . . That there was a liability in favor of the grantors imposed on the city upon the acceptance by it of the conveyance seems clear. The ability of the creditor to enforce a claim by a judgment for money is not essential to a 'liability' as that term is used in such

constitutional provisions as ours. . . The words 'any . . . liability in any manner or for any purpose' in our constitutional provision are words of broad import, and we think that, fairly construed, they include such an obligation as the one here involved.

"The facts of this case present what at first blush appears a rather novel application of the constitutional provision, but when the real transaction between the parties is fully understood, the matter appears simple enough. We are not concerned here with the indebtedness to be created in favor of contractors, materialmen, and workmen when the city each year contracts for the doing of certain work, or buys material and employs labor for the doing of the same. We have here simply the liability *to the grantors,* created by the acceptance of the conveyance. As to them, the transaction was simply one of sale and purchase, completely executed by the grantors, the consideration being the future improvement by the city of the conveyed premises in a specified way for the benefit of the grantors . . . It was the construction of the improvement at the specified cost year year, presumably to the benefit of their property, that constituted the consideration for their conveyance . . .

"In the view we take of the nature of this transaction, it is obvious that such cases as *McBean* v. *Fresno,* 112 Cal. 160, (53 Am. St. Rep. 191, 31 L.R.A. 794, 44 Pac. 358), *Smilie* v. *Fresno,* 112 Cal. 311, (44 Pac. 556), and *Doland* v. *Clark,* 143 Cal. 176, (76 Pac. 958), are in no way in point. Here the *full liability* to the grantors was created *upon the acceptance of the deed, the entire consideration therefor having been furnished.* The cases cited involved contracts for the furnishing to a city in the future of service, materials, etc., and it is held that no indebtedness or liability within the meaning of the constitutional provision is incurred until the furnishing of the service, materials, etc., the consideration for the payment to be made. The dis-

tinction is clear, and is recognized by many decisions. It is concisely stated in *Walla Walla* v. *Walla Walla Water Co.*, 172 U. S. 1, 20, (43 L. Ed. 341, 19 Sup. Ct. Rep. 77, see, also, Rose's U. S. Notes), as follows: 'In the one case the indebtedness is not created until the consideration has been furnished; in the other (where the consideration on the other side is fully furnished at the time of the transaction) the debt is created at once, the time of payment being only postponed.' " (Emphasis added.)

If in the instant case we accept the Government's theory, first, that the electrification of the bridges, establishment of harbor lines and the making available for use the abutting lands was the consideration which the County of Alameda asked and the Government gave in return for the county's agreeing to operate, maintain, repair and replace the bridges; second, that the so-called contract was executed prior to 1913; and third, that therefore lack of mutuality was no defense, then it must follow that the "full liability" of the County of Alameda to the United States Government was created upon the execution of the Government's part of the contract, "the entire consideration therefor having been furnished". As was said in the *Carmichael* case, we are not here concerned with the indebtedness to be created in favor of contractors, materialmen and workmen when the county contracted each year for the doing of certain work or the purchase of certain materials. It was the promise to operate, maintain, repair and replace the bridges—presumably for the benefit of the United States Government—that constituted the consideration for the execution of the alleged agreement.

The reasoning of the *Carmichael* case in interpreting section 18 of article XI of the constitution was applied by the Supreme Court of California to facts similar to those now before this court, in the cases of *San Francisco* v. *Boyle,* 195 Cal. 426, 433, 233 Pac. 965, 967; *City of*

Pasadena v. *McAllister,* 204 Cal. 267, 273, 267 Pac. 873, 874, and *Modesto Investment Co.* v. *Modesto City School District,* 213 Cal. 410, 413, 2 P. (2d) 387, 388. In each of these cases the court held void a contract made in derogation of this section of the constitution and in the first two definitely refused to apply the principles laid down in the case of *Fresno* v. *McBean,* 112 Cal. 159, 44 Pac. 358.

In the case of *Mahoney* v. *San Francisco,* 201 Cal. 248, 262, 263, 264, 266, 257 Pac. 49, 55, 56, 57 the city and county leased certain property for a term of years for stipulated rental installments and further agreed to pay additional installments equal to the taxes on said property and to construct improvements to cost large and undetermined amounts. The so-called lease likewise contained an option to purchase with a forfeiture clause. The court in holding the contract void and violative of section 18 of article XI of the constitution said:

> "The reasoning of counsel in an attempt to convert the contract herein into the 'contingency' class, such as is discussed in *Doland* v. *Clark,* 143 Cal. 176 (76 Pac. 958), *McBean* v. *Fresno,* 112 Cal. 159 (53 Am. St. Rep. 191, 31 L.R.A. 794, 44 Pac. 358), *Smilie* v. *Fresno County,* 112 Cal. 311 (44 Pac. 556), *State* v. *McCauley,* 15 Cal. 429, and others treating of similar situations, is fundamentally unsound. . .
>
> ". . . The reason for the constitutional restriction is fully set forth in the case last cited (*Arthur* v. *City of Petaluma,* 175 Cal. 216, 165 Pac. 698) and its purpose and wholesomeness have been too frequently elaborated by this court to require further comment. It is true that some color of justification for the incurrence of the liability herein attempted is to be gleaned from *McBean* v. *Fresno, Doland* v. *Clark, Smilie* v. *Fresno County,* and *State* v. *McCauley.* The first of these cases was a case of an emergency nature and involved the exercise of the police power in its highest sense, to wit, the preservation of the public health. *In re City and*

County of San Francisco, 191 Cal. 172 (215 Pac. 549), was likewise a health case, involving the care of persons afflicted with tuberculosis. The *McBean* case was no doubt written under the urge of the necessities of the situation, and this court has since been careful not to extend the rule beyond the facts therein stated, and has, as a matter of fact, distinguished that case from subsequent cases, thereby given effect to the constitutional provisions. . . The *McBean* case was definitely distinguished from *Chester* v. *Carmichael,* a case similar to the instant case . . . The distinction between that case and the *McBean, Smilie* and *Doland* cases, *supra,* is pointed out. The latter cases cited involved contracts for the furnishing to a city in the future of service, materials, etc., and it is held that no indebtedness or liability within the constitutional provision is incurred until the furnishing of the service, materials, etc., the consideration for the payment to be made, while in the former the full liability was created upon the acceptance of the deed. Here the consideration was the execution and acceptance of the contract of purchase and the putting of the City and County of San Francisco into possession of the property."

As was said in the foregoing case, so it might be said in the present one, that the duties and obligations of the County of Alameda, if any, were certain, definite and fixed and that the liability here sought to be imposed, though not definitely fixed or even estimated in dollars and cents, would inevitably exceed the income and revenue provided for the fiscal year in which the contract, if any, was made.

In the case of *Garrett* v. *Swanton,* 216 Cal. 220, 226, 227, 235, 13 P. (2d) 725, 728, 731, the plaintiffs as taxpayers prayed for a decree for the cancellation of a certain contract between the city and the Fairbanks Corporation and for an injunction to prevent the city from making further payments under the contract and for a decree requiring the defendants to repay the sum of $30,000 already

paid under the contract. According to the purported contract the defendants had agreed to install a pumping plant for the city at a total cost of $152,000 and the city agreed to pay $30,000 in cash upon the commencement of the work and the balance in sixty equal monthly installments. The plaintiffs contended that the total obligation of this contract exceeded the income and revenue of the city for the year in which the contract was executed and that upon the execution of the contract an immediately liability for the full amount of the contract price came into existence. The court said:

> ". . . There can be no doubt that immediately upon entering into the contract a liability arose for the full purchase price. The law is well settled in this state that installment contracts of any kind, where the installment payments are to be made over a period of years and are to be paid out of the ordinary revenue and income of a city, where each installment is not in payment of the consideration furnished that year, and the total amount of said installments when coupled with the other expenditures exceeds the yearly income, are violative of the constitutional provision in question unless approved by a popular vote. This is so whether the contract be denominated a mortgage, lease or conditional sale. (*Chester* v. *Carmichael,* 187 Cal. 287 (201 Pac. 925); *In re City and County of San Francisco,* 195 Cal. 426, (233 Pac. 965); *Mahoney* v. *San Francisco,* 201 Cal. 248 (257 Pac. 49).) It is true that under the doctrine enunciated in *McBean* v. *City of Fresno,* 112 Cal. 159 (53 Am. St. Rep. 191, 31 L.R.A. 794 (44 Pac. 358), *Smilie* v. *Fresno County,* 112 Cal. 311 (44 Pac. 556), *Doland* v. *Clark,* 143 Cal. 176 (76 Pac. 958), *California Pacific Title & Trust Co.* v. *Boyle,* 209 Cal. 398 (287 Pac. 968), contracts for the furnishing of property in the future have been upheld, but only where no liability or indebtedness came into existence until the consideration was actually furnished.

> In other words, such contracts are valid where each year's installment is within the city's income, and where each year's payment is for the consideration actually furnished that year . . . This exception can have no application to the case at bar for the reason that the liability of the city for the entire contract price came into existence at the time the contract was entered into, and the installments were not to be paid each year for the work to be performed in that year. . .
>
> ". . .
>
> "We are not unmindful of the arguments of expediency and necessity advanced by respondents, but we are of the opinion that such arguments are not sufficient to uphold this contract. The constitutional provision involved is based on sound public policy. Arguments of convenience, of policy, or of present necessity, should not be allowed by loose construction to weaken the force or limit the extent of the debt limit provisions."

Courts of other states in interpreting similar constitutional provisions have followed the reasoning which the courts of California have applied in the cases herein cited and in many instances have expressly referred to and relied upon the California cases.[7]

The foregoing authorities amply support the appellant's contention that the alleged contract between the United States Government and the County of Alameda, executed on or before November 10, 1913, violated section 18 of article XI of the constitution and is therefore *ultra vires* and void.

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7. *Sager* v. *City of Stanberry*, 336 Mo. 213, 221-227, 78 S.W. (2d) 431, 435; *Anderson* v. *International School District*, 32 N.D. 413, 422, 156 N.W. 54, 56; *Tamaqua* v. *Krebs*, 25 Pa. D. R. 848; *Brown* v. *City of Corry*, 175 Pa. 528, 530-535, 34 A. 854; *Ramsey* v. *City of Shelbyville*, 26 Ky. L.R. 1102, 83 S.W. 116, 117; *Keller* v. *City of Scranton*, 200 Pa. 130, 133-136, 49 Atl. 781, 782.

III.

THE CONCLUSION OF LAW CONTAINED IN PARAGRAPH VI OF "CONCLUSIONS OF LAW" THAT "THE EXPENDITURES MADE BY THE COUNTY OF ALAMEDA TO OPERATE AND MAINTAIN THE FRUITVALE AVENUE BRIDGE WERE AND ARE NOT GIFTS TO A PRIVATE CORPORATION OF PUBLIC MONEY PROHIBITED BY SECTION 31 OF ARTICLE IV OF THE CALIFORNIA CONSTITUTION" IS ERRONEOUS AND THE COURT SHOULD HAVE CONCLUDED AS A MATTER OF LAW THAT THE EXPENDITURES MADE BY THE COUNTY OF ALAMEDA TO OPERATE AND MAINTAIN THE FRUITVALE AVENUE BRIDGE ARE AND ALWAYS HAVE BEEN GIFTS OF PUBLIC MONEY OR THINGS OF VALUE TO INDIVIDUALS AND MUNICIPAL OR OTHER CORPORATIONS, PROHIBITED BY SECTION 31 OF ARTICLE IV OF THE CONSTITUTION OF THE STATE OF CALIFORNIA AND VIOLATIVE OF THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES (APPENDIX p. xxxii).

The alleged license agreement, revocable at will by the Secretary of War, purported to forever bind the County of Alameda to expend its funds on the operation, maintenance, repair and rebuilding of the Fruitvale Avenue Bridge which, as well as the land beneath it and on which it rests, has been at all times, and now is the property of the United States. The railroad tracks carrying railroad traffic of a private railroad corporation are, and always have been permanent, integral and inseparable parts of said bridge (Tr. 138, 266).

A. The Alleged License Agreement Requires the County to Make a Gift of its Tax Moneys to a Private Railroad Corporation.

Section 31 of article IV of the California Constitution in so far as pertinent here, provides as follows:

> "The legislature shall have no power . . . to make any gift or authorize the making of any gift, or any public money or thing of value to any individual, municipal or other corporation whatever; . . ."

It is well established law that the term "gift" prohibited by said constitutional provision is not limited to a mere voluntary transfer of property without consideration, but also includes any appropriation of public money for which there is no authority or enforceable claim.

In *Conlin* v. *Board of Supervisors,* 99 Cal. 17, 22, 24, 33 Pac. 753, 755, 756, a state legislative act directed the board of supervisors of the City and County of San Francisco to pay a certain sum remaining unpaid on contracts for which the contractor had no legal claim against the municipality. Upon refusal of the board of supervisors to pay the same, plaintiff brought a mandamus proceeding. The California Supreme Court held that the appropriation was a gift within the prohibition of section 31 of article IV of the State Constitution and stated:

> ". . . An appropriation of money by the legislature for the relief of one who has no legal claim therefor must be regarded as a gift, within the meaning of that term, as used in this section, and it is none the less a gift that a sufficient motive appears for its appropriation, if the motive does not rest upon a valid consideration.
>
> ". . . The constitution makes the same inhibition on an appropriation of public moneys by the legislature without any consideration, that exists against a similar appropriation by a municipality . . ." [1]

It has been held that this constitutional provision prohibits cities as well as counties from making any gifts of public funds and of using public funds for private purposes.

In *San Diego Water Co.* v. *City of San Diego,* 59 Cal. 517, 520, 521, 522, the city agreed with plaintiff to take water and to pay therefor at a rate in excess of that provided in the plaintiff's charter and for water which the

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1. Accord: *County of Los Angeles* v. *Jessup,* 11 Cal. (2d) 273, 275-278, 78 P. (2d) 1131, 1132-1134; and *Goodall* v. *Brite,* 11 Cal. App. (2d) 540, 54 P. (2d) 510.

city was legally entitled to receive without charge. The Supreme Court of the State of California said:

> "Besides, the city itself had no power under its charter to make an engagement with the company to pay for water which the latter was bound by the law of its incorporation to furnish free for 'municipal necessities,' and at reasonable rates to be fixed as required by the law, 'for family uses.'
>
> ". . .
>
> "But it is urged that the meritorious consideration for the contract between the plaintiff and the city, . . . is not the water furnished to the city, but the erection of works and machinery, and conducting the water to the place where the city required it.
>
> "If that were the consideration and nature of the resolution adopted by the Board of Trustees, there is nothing in the charter of the city to sustain it. For the charter contains no express grant of power to the Board to aid in the construction of improvements partaking of a public character, and in the absence of such authority the action of the Board would be unauthorized. But even if there were in the city charter a grant of such power, the Board could not, in the exercise of the power, contract to pay money, or to appropriate the revenues of the city to aid in constructing the works of a *private* corporation. Such a contract would be in violation of the Constitution and laws of the State, beyond the scope of the corporate powers of the city, and any instrument in writing made, or any resolution adopted, for that purpose would be void." [2]

It is submitted that the alleged license agreement which purported to require the County of Alameda to expend its tax moneys to forever operate, maintain, repair, and when necessary, rebuild the Fruitvale Avenue Bridge, a combination railroad, highway and pedestrian bridge used

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2. Accord: *Pacific Indemnity Co.* v. *Myers*, 211 Cal. 635, 643, 296 Pac. 1084, 1087; *Chapman* v. *City of Fullerton*, 90 Cal. App. 463, 468, 265 Pac. 1035, 1037; and *Comstock* v. *Davis*, 44 Cal. App. 275, 277, 186 Pac. 380.

continually by a private railroad corporation for the transit of trains thereover, involved the expenditure of said public funds for a private purpose as distinguished from a public purpose and such expenditure would constitute a gift to a private railroad corporation within said constitutional prohibition.

In *Higgins* v. *San Diego Water Co.*, 118 Cal. 524, 546, 547, 45 Pac. 824, 828, 829, 50 Pac. 670, there was a lease from a water company to five persons and a sublease from them to a city of the entire water company plant at a monthly rental. Among other things the lease provided that the sublessor should cause a railroad to be constructed. The Supreme Court of the State of California said:

> ". . . It is claimed by counsel for respondent, and seems to be conceded by counsel for appellant, that a contract by a municipal corporation of California to pay money to any person or corporation to secure the construction of a railroad would be void because in violation of section 31 of article IV of the constitution . . ."

The court then stated:

> "It does not seem entirely clear that such a contract would come within the strict terms of this provision, but certainly it would involve, in part at least, *the evils which the constitutional restriction was designed to prevent,* because it would afford *a ready means of accomplishing by indirection what could not be done openly and avowedly.* It is not necessary, however, to decide this question here, for there is no suggestion that the charter of San Diego confers authority upon the common council to expend any portion of the municipal funds in constructing or aiding the construction of railroads; and, in the absence of such authority, an agreement of the character supposed would necessarily be invalid." (Emphasis added.)

Hence from the foregoing decision it would appear to be certain that since the county was and is prohibited from

directly subsidizing the construction of a railroad, it was and is likewise prohibited from expending its tax moneys in aid of a private railroad corporation through any indirection such as the alleged license agreement with the United States. If it were otherwise, certainly *"the evils which the constitutional restriction was designed to prevent"* would afford *"a ready means of accomplishing by indirection what could not be done openly and avowedly."*

In complete harmony with the foregoing California decisions the court in *County of Alameda* v. *Ross,* 32 Cal. App. (2d) 135, 141, 147, 89 P. (2d) 460, 462, 465, 466, *held the alleged license agreement now in issue before this court to be illegal and void* and said:

> *". . . and because the particular indebtedness which is involved in this proceeding constitutes a gift of public funds to a private corporation in conflict with article IV, section* 31, *of the Constitution of California.*
>
> ". . .
>
> "The board of supervisors of Alameda County had no authority to incur indebtedness or expend public funds for the sole benefit of the Southern Pacific Railroad Company, a private corporation. It appears that the materials which are involved in this proceeding are solely for the improvement and benefit of the Southern Pacific Railroad Company tracks across the bridge. The payment of the indebtedness which is here involved is in the nature of a gift or free contribution to the corporation, and it is, therefore, illegal and void. (Art. IV, sec. 31, Const. of Calif.; *County of Los Angeles* v. *Jessup,* 11 Cal. 2d 273, [78 Pac. 2d 1131]; *Goodall* v. *Brite,* 11 Cal. (2d) 540, [54 Pac. (2d) 510]; *First National Bank of Orland* v. *Ball,* 90 Cal. App. 709, [266 Pac. 604]; *Powell* v. *Phelan,* 138 Cal. 271, [71 Pac. 335].) In *Higgins* v. *San Diego Water Co.,* 118 Cal. 524, [45 Pac. 824, 50 Pac. 670], *it was held that a contract by a municipal corporation to pay public funds to a corporation or to an individual for the con-*

struction of a railroad is violative of article IV, section 31, of the Constitution and, therefore, void." (Emphasis added.)

The state courts throughout the United States are also in accord with the California decisions heretofore discussed.

In *Nassau County* v. *City of Long Beach,* 272 N. Y. 260, 266-267, 5 N.E. (2d) 811, 814, a statute which relieved a city of liability to a county for the amount of uncollected taxes certified to it for collection was held unconstitutional and void because the city's indebtedness to the county constituted "property" which could not constitutionally be devoted to private purposes by the county and if released to the city, the city *might* devote it to such private purposes. The court stated:

> "That asset of the county could not legally be devoted to private purposes under the provision of the Constitution either voluntarily by the act of the county or by compulsion under an act of the Legislature. The city is engaged in private purposes as well as in public functions and the Constitution in unmistakable terms forbids the use of its property or credit for such private purpose. . . ." [3]

In the preceding decision the action by the county would have at least been under the color of a statutory authorization, even though unconstitutional and void, whereas in the issue now before this court, the action by the County of Alameda in entering into said alleged license agreement was not even under the color of any authorization whatever.

In addition, the case now before this court is a much more flagrant violation of a similar constitutional prohibition than in the preceding case discussed. In said preceding

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3. Accord: *Mahon* v. *Board of Education,* 171 N. Y. 263, 63 N.E. 1107; *Oswego Falls Corporation* v. *Fulton,* 148 Misc. 170, 265 N.Y.S. 436, 442; affirmed 268 N.Y.S. 978; *People* v. *Holten,* 287 Ill. 225, 232, 233, 122 N.E. 540, 543; *Skutt* v. *City of Grand Rapids,* 275 Mich. 258, 266 N.W. 344, 347; *Stell* v. *Mayor and Aldermen of Jersey City,* 95 N.J. Law 38, 111 A. 274; and *Farnsworth* v. *Town of Wilber,* 49 Wash. 416, 420, 421, 95 Pac. 642, 644.

case the county assets so relinquished to the city *might* have been used for a private purpose, whereas, pursuant to the terms of the alleged license agreement now before this court, the county assets *must* be used for a private purpose, to wit, the operation, maintenance, repair and when necessary the rebuilding of the Fruitvale Avenue Bridge for the continual use of a private railroad corporation in the manner hereinbefore set forth.

In *Garland* v. *Board of Revenue of Montgomery County,* 87 Ala. 223, 224-228, 6 So. 402, 403, an act which authorized counties to erect a bridge which might be either a free foot and wagon bridge for the traveling public or a railroad bridge, *or both combined,* was held to violate a constitutional provision which declared that the legislature should have no power to authorize any county to lend its credit, or to grant public money or a thing of value in aid of, or to any individual, association or corporation.

As heretofore pointed out, without any constitutional, statutory or charter authorization the board of supervisors of Alameda County purported by said alleged license agreement to forever operate, maintain, repair and when necessary replace a combination railroad, vehicular and pedestrian bridge for the use of a private railroad. Assuming, for the sake of argument only, that there had been a statute so authorizing such a type of agreement, the County of Alameda or its board of supervisors could not have become bound thereby, for, as seen by the foregoing decision, such a statute would clearly be unconstitutional as granting county tax moneys in aid of a private railroad corporation. Therefore it is certain that the action taken without any authorization violated the constitutional prohibition under discussion.

In *Board of Education* v. *Alton Water Co.,* 314 Ill. 466, 471, 145 N.E. 683, 685, a city had granted a water company a franchise which provided among other things that the

water company would furnish free water to all public and parochial schools in the city, to be paid for by city taxes. The Supreme Court of the State of Illinois held petitioner not to be entitled to free water and said:

> ". . . A municipal corporation holds its property in trust for public uses, and its funds can be used only for corporate purposes. They cannot be diverted to private use. Nor can the municipal authorities or the electors give away the money or property of the municipality . . .
>
> "The city of Alton and the appellate Board of Education are separate corporate entities, each clothed with the power of taxation for its corporate purposes and for none other. They are organized under different laws for a specific purpose. The parochial schools are purely private institutions, and neither municipal corporation has any authority to contract or levy a tax for their benefit . . ."

The foregoing decision is precisely to the same effect as that of the Supreme Court of the State of California in *Higgins* v. *San Diego Water Co.,* 118 Cal. 524, 546, 547, 45 Pac. 824, 828, 829, 50 Pac. 670. So in this case neither the County of Alameda nor its board of supervisors could so contract with the United States that a private railroad corporation would obtain the free and continual use of the Fruitvale Avenue Bridge forever at the expense of the taxpayers of the County of Alameda.

Alter v. *City of Cincinnati, et al.* and *Ampt* v. *Same,* 56 Ohio St. 47, 63-64, 66, 46 N.E. 69, 70, 71, were actions to test the constitutionality of a municipal water works act which among other things provided that part of the water works would be owned by the city and another part thereof would be owned by a corporation or individual, and would be operated, managed and conducted by the city. The constitution prohibited the assembly from authorizing a county or city from loaning its credit to, or in aid of a company

or corporation. The Supreme Court of Ohio held the statute unconstitutional and said:

> ". . . The municipality must be the sole owner and controller of the property in which it invests its public funds. A union of public and private funds or credit, each in aid of the other, is forbidden by the constitution. There can be no union of public and private funds or credit, nor of that which is produced by such funds or credit. The whole ownership and control must be in the public. . . .
>
> ". . .
>
> ". . . The provision that the works shall be operated, managed and conducted by the city does not relieve the matter, because, before the city can operate the works, it must first obtain a lease upon such terms as may be agreed upon, and that puts it beyond the power of the city to operate and control the works as sole proprietor. It would be a joining of two properties, owned by different parties, together to make one property, the parts owned by each being necessary to the successful operation of the whole, and each owner having his say as to the terms and conditions upon which the whole shall be operated. . . ."

The same reasoning as in the foregoing decision compels the conclusion that the County of Alameda "must be the sole owner and controller of the property in which it invests its funds." The expenditure of county tax funds on the Fruitvale Avenue Bridge belonging to the United States, over which the trains of a private railroad corporation continually pass, can scarcely be said to comply with this requirement.

The expenditure of public funds, directly or indirectly, in aid of a private railroad corporation, is a violation of the "due process clause" of the Constitution of the United States. An early outstanding decision on "due process of law" is *Taylor* v. *Porter,* (N.Y.) 4 Hill 140, where a statute authorizing a private road for the benefit of B,

to be laid out over the lands of A, without the consent of A, was held unconstitutional and void. It was held that the legislature could not take the property of A and transfer it to B without violating the "due process" clause. Cited with approval by the Supreme Court of the United States in *King* v. *Mullins,* 171 U. S. 404, 429, 430, 43 L. ed. 214, 224.

In *Eyers Woolen Co.* v. *Town of Gilsum,* 84 N.H. 1, 16, 24-28, 146 Atl. 511, 524, an act authorizing a town to exempt a new woolen mill from taxation for not more than ten years was held invalid under a constitutional provision prohibiting the general court from authorizing any town to loan or give its money or credit, directly or indirectly, for the benefit of any corporation having for its object a dividend of profits. The Supreme Court of the State of New Hampshire further held that an appropriation of money raised or to be raised by taxation to aid private manufacturers was not "due process" and was a violation of the Fourteenth Amendment of the Constitution of the United States, as being the taking of private property of one person for the private use of another person.

It is accordingly submitted that any transfer of county moneys belonging to the taxpayers of the County of Alameda to the use of a private railroad corporation through the medium of the alleged license agreement with the United States was, and is a violation of the "due process" clause of the United States Constitution.

The decisions of the federal courts are in complete accord with the foregoing firmly established principles of California and other state courts. The federal courts have held that tax moneys cannot be diverted to private purposes.

In the leading case of *Citizens' Savings and Loan Association* v. *Topeka,* 20 Wall. (U.S.) 655, 659, 22 L. ed. 455, 460, where it appeared that the city of Topeka had issued

bonds to aid and encourage a bridge manufacturing company to establish a bridge works in the city, relying on a statute vesting such a power in the city, the Supreme Court of the United States held that the statute was void as an attempt to authorize taxation for a nonpublic purpose.[4]

It is submitted that obviously the expenditure of public funds by the County of Alameda to operate, maintain, repair and when necessary to replace this bridge for the use and benefit of a private railroad corporation is for a private purpose, as distinguished from a public purpose, and constitutes a gift within the constitutional prohibition contained in section 31 of article IV of the Constitution of the State of California and is a violation of the Fourteenth Amendment to the Constitution of the United States, as it constitutes the taking of private property of one person for the private use of another person.

Furthermore, if at any time this bridge became unnecessary for highway and pedestrian purposes, the county could never abandon the same if said alleged license agreement is valid and binding. The county would nevertheless be bound to forever operate, maintain, repair and rebuild said bridge for the sole use and benefit of a private railroad corporation which would clearly be making a prohibited gift of public money to a private railroad corporation.

B. The Alleged License Agreement Requires the County of Alameda to Make a Gift of County Tax Moneys to the United States.

The foregoing decisions set forth in the preceding section A are also applicable here. The additional cases hereinafter referred to also compel the conclusion that the alleged license agreement was, and is void as providing

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4. Accord: *Sutherland-Innes Co.* v. *Evart* (C.C.A. 6th 1898) 86 Fed. 597, 601, 30 C.C.A. 305; *Cole* v. *La Grange*, 113 U.S. 1, 28 L. ed. 896, 5 Sup. Ct. 416; *Parkersburg* v. *Brown*, 106 U.S. 487, 27 L. ed. 238, 1 Sup. Ct. 442; and *Dodge* v. *Mission Twp.* (C.C.A. 8th 1901) 107 Fed. 827.

for an unconstitutional gift by the County of Alameda to the United States.

In *State* v. *County Court,* 142 Mo. 575, 584, 44 S. W. 734, the Supreme Court of the State of Missouri concluded that the legislative act requiring a county court to draw warrants to such towns within the county as should make application for a portion of the county taxes levied and collected upon property within the limits of such towns for expenditure on the roads therein, was in conflict with the constitutional provision prohibiting the making of any grant of public money "to any individual, association of individuals, municipal or other corporation whatsoever".[5]

Just as the *county* in the preceding case, though acting under the purported authority of a statute, was precluded from making a grant of its public money to a *town,* so the *County of Alameda* or its board of supervisors, not even acting under color of any statutory authorization whatever, was certainly precluded from making a grant of its public tax moneys to the *United States* for the perpetual operation, maintenance, repair and whenever necessary the rebuilding of a bridge belonging to said United States and located on land also belonging to it. Nor would the result have been any different if a statute had purported to authorize such grant, as such statute would have been in violation of section 31 of article IV of the state constitution. Any permanent improvement of, repair to, or rebuilding of said bridge would be the property of the United States. Because of the revocable nature of the alleged license in question, permanent improvements involving large expenditures of county tax funds or even a replacement of said bridge at an estimated cost of approximately $1,250,000 might be concluded one day at the county's expense and, by revocation of said license by the United

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5. Accord: *Russell* v. *Tate,* 52 Ark. 541, 545, 13 S.W. 130, 132; and *Miller* v. *City of Cornelia,* 188 Ga. 674, 4 S.E. (2d) 568, 569.

States, the following day the County of Alameda would become forever deprived of any use and benefit whatsoever from such expenditure. *County of Alameda* v. *Ross,* 32 Cal. App. (2d) 135, 141, 89 P. (2d) 460, 462, 463.)

It is submitted that this would clearly constitute a gift of public funds to the United States which not only is not authorized by statute, but is expressly prohibited by section 31, article IV of the state constitution.

IV.

THE COURT ERRED IN NOT CONCLUDING AS A MATTER OF LAW THAT THE ALLEGED CONTRACT BETWEEN THE UNITED STATES AND THE COUNTY OF ALAMEDA, NOT SPECIFYING ANY TIME FOR WHICH SAID COUNTY WAS BOUND TO OPERATE, MAINTAIN, REPAIR AND IF NECESSARY, REBUILD THE FRUITVALE AVENUE BRIDGE, WAS CONTRARY TO PUBLIC POLICY AND VOID AND/OR WAS SUBSTANTIALLY COMPLIED WITH AFTER A REASONABLE TIME AND/OR WAS TERMINABLE AT THE WILL OF EITHER PARTY (APPENDIX p. xxxvi).

In its complaint for declaratory judgment the United States Government prayed for an order whereby the County of Alameda would be *forever* bound to operate, maintain, or rebuild the Fruitvale Avenue Bridge (Tr. 15). Assuming for the sake of argument only that the alleged contract is not void for want of consideration or mutuality nor because of the fact that it was a contract beyond the scope of the authority of the board of supervisors to execute, and assuming further that the said contract was not invalid because the expenditure therein provided for exceeded the income and revenue for the fiscal year 1913-14 in contravention of the provisions of section 18 of article XI of the California Constitution, or because the expenditure was such a gift of public money to a private corporation as was prohibited by section 31 of article IV of said constitution, and the "due process" clause of the United

States Constitution, and that said contract was not void for uncertainty or unfairness, it would still be uneforceable and void because of the absolute lack of any provision therein for any definite time during which the parties were bound by the terms of the alleged agreement.

The resolution of 1909 read in part as follows:

> "BE IT RESOLVED that the County of Alameda . . . hereby agrees to accept said bridges . . . and to assume all costs of future repair, operation and replacement of said bridges. . ." (Tr. 168.)

The revocable license issued by the United States Government in 1910 read in part as follows:

> "This license is granted subject to the following conditions and provisions:
>
> ". . .
>
> "4. That said Board of Supervisors shall maintain these bridges, attending to all necessary repairs, and rebuilding same if at any time burned, destroyed or become inadequate for the purpose they serve." (Tr. 172.)

The resolution of the board of supervisors of 1913 provided:

> "BE IT RESOLVED that the Board of Supervisors of Alameda County, California, does hereby accept and assume control of the three bridges heretofore built by the United States in connection with the improvement of Oakland Harbor . . . subject to the provisions and conditions of the aforesaid License of September 3, 1910 . . ." (Tr. 175.)

A reading of the foregoing excerpts from the only documents which even purport to constitute a contract conclusively establishes the fact that the alleged agreement was entirely silent as to the time during which the County of Alameda was to maintain and repair the bridges. In the absence of any specification as to the time during which the county was bound, the district court should have

found as a matter of law that these documents must have been construed in one of the three following ways:

A. As an attempt to bind the county to do these things for all time to come, hence *ultra vires* and void, a construction opposed to public policy and to the overwhelming weight of the authorities of both state and federal courts; or

B. As an attempt to bind the county for a reasonable time and therefore substantially complied with after a period of twenty-seven years and an expenditure of over $700,000; or

C. As an agreement terminable at the will of either party after due notice and hence terminated by the notice of the board of supervisors of the County of Alameda dated September 28, 1939, wherein the United States Government was notified that Alameda County would cease to operate the Fruitvale Avenue Bridge after the 31st day of December 1939 (Tr. 176).

A. A Contract Which Purports to Bind a County for All Time to Come in Regard to a Governmental Function is Against Public Policy and Void.

If the alleged contract between the county and the federal government sought to bind the county to maintain, repair and replace the bridges for all time to come, it was void as against public policy and unenforceable. The legislative body of the state or a subdivision thereof is without authority to make contracts which will bind successive legislative bodies in regard to governmental functions for an indefinite period or *in perpetuo* and any contract which seeks so to do is void.

This rule was enunciated by the Supreme Court of the United States in the case of *Newton* v. *Commissioners,* 100 U. S. 548, 559, 25 L. ed. 710, 711. In 1846 the State of Ohio passed a statute providing that upon the fulfillment of certain terms and conditions by the citizens of the

town of Canfield the county seat would be "permanently established at that town". These terms and conditions were complied with and the county seat was established accordingly. In 1874 the legislature passed an act providing for the removal of the county seat to Youngstown, whereupon the citizens of Canfield filed a bill in equity to perpetually enjoin the removal of the courthouse.

The Supreme Court of the United States in holding that there could be no contract or irrepealable law concerning "governmental subjects" said:

> "They involve *public interests,* and legislative acts concerning them are necessarily *public laws.* Every succeeding legislature possesses the same jurisdiction and power with respect to them as its predecessors. The latter have the same power of repeal and modification which the former had of enactment, neither more nor less. All occupy, in this respect, a footing of perfect equality. This must necessarily be so in the nature of things. It is vital to the public welfare that each one should be able at all times to do whatever the varying circumstances and present exigencies touching the subject involved may require. A different result would be fraught with evil."

In the case of *Illinois Central R. R. Co.* v. *Illinois,* 146 U. S. 387, 459, 460, 36 L. ed. 1018, 1045, 13 Sup. Ct. 110, 120, 121, the United States Supreme Court in commenting upon the case of *Newton* v. *Commissioners, supra,* stated:

> "As counsel observe, if this is true doctrine as to the location of a county seat it is apparent that it must apply with greater force to the control of the soils and beds of navigable waters in the great public harbors held by the people in trust for their common use and of common right as an incident to their sovereignty. The legislature could not give away nor sell the discretion of its successors in respect to matters, the government of which, from the very nature of things, must vary with varying circumstances. The legislation which

> may be needed one day for the harbor may be different from the legislation that may be required at another day. Every legislature must, at the time of its existence, exercise the power of the State in the execution of the trust devolved upon it.

The reasoning of the foregoing cases is compelling in the case at bar. That the maintenance of a bridge as part of a highway system of a county is a governmental function, is not open to question. It is hard to conceive of any function of government that is more open to the vicissitudes of the growth and progress of population and commerce than the public streets and highways and, hence, of any bridge forming a part thereof. Within a relatively short time population centers and business districts may shift from one part of a county to another; within twenty-five years new means of transportation and communication may make obsolete and unnecessary roads and highways which are imperative today. Whereas today a bridge may be the most economical means of crossing the Tidal Canal at a particular point, within twenty-five years a tube or some other means of traversing the said span may constitute the only practical means of meeting the needs of that time. It is also conceivable that within twenty-five years there may be so many and such urgent needs which must be met by the tax rate of that period, that the board of supervisors of Alameda County might in their discretion decide that it was unnecessary, undesirable, impractical or even impossible for Alameda County to continue to operate the Fruitvale Avenue Bridge at an approximate cost of one thousand dollars a month. Traffic might move up and down the Estuary so that the Park Street Bridge or the High Street Bridge, or both, might be sufficient to accommodate its needs. No one can foretell what the future needs of a county may be, hence no one board of supervisors can or should be permitted to bind a

county indefinitely to any particular program regarding so important a matter.

This proposition was discussed in *Wabash Railroad Co.* v. *Defiance,* 167 U. S. 88, 93, 94, 97, 98, 100, 42 L. ed. 87, 90, 91, 92, 93, 17 Sup. Ct. 748, 750, 751, 752, 753, wherein the question was whether a city ordinance dated December 20, 1887, permitting the railway to construct certain bridges and their approaches constituted a contract between the railroad company and the city for the perpetual maintenance of such bridges and whether the subsequent ordinance of 1893 changing the grade of streets and approaches impaired the obligation of the contract or deprived the railroad company of its property without "due process" of law, and the United States Supreme Court said:

> "The language of this ordinance is rather that of a license than that of a contract: the railway is authorized to erect new bridges of a certain construction, provided that the company shall also build sufficient approaches and grade to each of said bridges, and keep them in good repair. The city itself agrees to do nothing, except to permit gravel to be taken from its gravel bed, without charge, for the construction of such approaches. It does not agree that the bridges or their approaches shall remain any particular length of time, or that it shall not make new requirements as the growth of the city may seem to suggest. The only contract as to time which could possibly be extracted from this ordinance would be that the railway company, on building the bridges and approaches, should be entitled to maintain them in perpetuity. The result would be that, . . . they would stand forever in the way of any improvement of the streets. This proposition is clearly untenable. It is incredible, in view of the language of this ordinance, that the city could have intended, or the railroad company have expected, that the former thereby relinquished forever the right to improve or change the grade of these streets.

". . . It is claimed that the construction of the sidewalks by the railroad company was a consideration, since it had been the duty of the city up to that time to keep them in repair; but it surely could not be a consideration for the perpetual maintenance of the bridges. If it were a consideration for anything it would simply be for the permission given to the railway to build the bridges—a permission obtained upon a special application of the railway company. Properly construed, this ordinance was simply a license to the company to build these bridges, and to continue them until the city council should conclude that it was for the public interest to so change the grade of the street as to make it a level crossing.

" . . .

". . . If the court, however, is to be considered as holding that an agreement or license to construct bridges, which is silent as to time, should be construed as an agreement that they are to remain in perpetuity, we should find ourselves confronted with too many authorities to the contrary to accept it as a sound exposition of the law.

". . . Indeed, the right of a city to improve its streets by regrading or otherwise is something so essential to its growth and prosperity that the common council can no more denude itself of that right than it can of its power to legislate for the health, safety and morals of its inhabitants."

In the case of *Boise City Artesian Hot and Cold Water Company* v. *Boise City* (C.C.A. 9th, 1903) 123 Fed. 232, 235, the court said:

". . . *irrespective of such constitutional limitation,* it is clear, both upon reason and authority, that no municipal corporation, in the absence of express legislative authority, has power to grant a perpetual franchise for the use of its streets. . . A municipal corporation intrusted with the power of control over its public streets cannot, by contract or otherwise, irre-

vocably surrender any part of such power without the explicit consent of the Legislature. Cooley's *Constitutional Limitations* (2d Ed.) 205, 210; Dillon on *Municipal Corporations,* § § 715, 716; *Barnett* v. *Denison,* 145 U. S. 135, 139, 12 Sup. Ct. 819, 36 L. Ed. 652. . ." (Emphasis added.)

In the case of *State ex rel. City of St. Paul* v. *Minnesota Transfer Ry. Co.* 80 Minn. 108, 118, 83 N.W. 32, 36, the court in holding that the city had no power, either express or implied, to enter into a contract whereby it assumed for all times to repair a bridge, stated:

". . . We are of opinion that an agreement on the part of the city to maintain this bridge for all time was beyond the power of the officers of the city, contrary to public policy, void, and of no effect, . . ."

In *Robbins* v. *Hoover,* 50 Colo. 610, 616, 115 Pac. 526, 528, the court in declaring void a bequest for a county hospital, provided the county commissioners should support and maintain the same, said:

". . . Each year the board must make its various appropriations of money for the necessary public purposes, and levy the necessary taxes to meet them. Within the statutory or constitutional limits each board must for itself determine the tax levy and the amount of such appropriations, and it is beyond the power of any board, in any one year, to determine for its successor in any subsequent year how it shall perform such duties, or prescribe or limit its action in the exercise of governmental functions, all of which is equivalent to saying that, under our existing laws, it is legally impossible for a board of commissioners to bind the county forever to maintain and support the hospital which Mr. Macky was desirous of building, and, for that reason, his bequest is void as depending upon an impossible condition."

In *Glenn* v. *Moore County Com'rs.,* 139 N.C. 412, 417, 52 S.E. 58, 60, the plaintiff sought to compel the county commissioners to repair a public bridge originally built by the plaintiff's predecessors in interest as a private bridge and later conveyed to the county in consideration of the county's maintaining the same. The court in denying the writ stated:

> ". . . We do not think it competent for a board of commissioners to enter into a contract with a citizen to perpetually maintain and keep in repair a public road or bridge, giving to such citizen a cause of action against the county whenever, in the exercise of its discretion in the interest of the public, the same or another board shall deem it proper to discontinue such road or bridge. The power vested in and duly imposed upon boards of commissioners to open and maintain roads and erect and keep in repair public bridges is for the benefit of the public, and they have no power to exercise it for any other purpose, or to bind their successors in that respect. . . ."

In the case of *Board of Sup'rs. of Apache County* v. *Udall,* 38 Ariz. 497, 509, 1 P. (2d) 343, 348, the facts of which are set forth on page 26, the court stated:

> "Further, the contract binds Apache county to maintain the road indefinitely 'to the satisfaction of the Secretary of Agriculture.' The statutes give the supervisors of a county the right to abandon county highways under the circumstances and in the manner provided in section 1701, *supra.* We are of the opinion in the absence of express statutory authority they may not contract away this right and the contract is void for this reason also."

Numerous other cases from various jurisdictions have held that a contract which seeks to impose upon a political subdivision of the state a perpetual obligation to do a

certain thing or spend public money in a certain way is against public policy and void.[1]

If the Government contends that the purported agreement between the County of Alameda and the United State Government binds the County of Alameda to operate, maintain, repair and rebuild the Fruitvale Avenue Bridge for all future time, then the purported contract is opposed to public policy and void.

B. A Contract Which Was Silent As to the Time of Its Duration Was Substantially Complied With After a Reasonable Time, To-Wit, After a Period of Twenty-Seven Years.

Because a contract to which a public governmental body is a party is against public policy and *ultra vires* if it purports to grant a perpetual right or to impose a perpetual obligation, the courts are hesitant, unless compelled so to do by the unequivocal language of the instrument itself, to construe an agreement as an attempt to bind the parties for all time to come but rather are inclined to hold that the intent of the parties was that they should be bound for a reasonable time or until either of them terminated said agreement.

In the early case of *Newton* v. *Commissioners,* 100 U.S. 548, 561, 562, 25 L. ed. 710, 712, a statute provided that a county seat should be *permanently* established in the City of Canfield. In denying an injunction to prevent the removal of the county seat therefrom, the Supreme Court of the United States said:

> "The rules of interpretation touching such contracts are well settled in this court. In *Tucker* v. *Ferguson* (22 Wall. 527) we said: 'But the contract must be

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1. *City of Brenham* v. *Brenham Water Co.*, 67 Tex. 542, 554, 4 S.W. 143, 149; *Horkan* v. *City of Moultrie,* 136 Ga. 561, 562, 71 S.E. 785; *City Council of Augusta* v. *Richmond County,* 178 Ga. 400, 173 S.E. 140, 141; *Aven* v. *Steiner Cancer Hospital,* 189 Ga. 126, 139, 140, 5 S.E. (2d) 356, 364; *State ex rel. Townsend* v. *Board of Park Com'rs.* 100 Minn. 150, 154, 110 N.W. 1121, 1122; *Belden* v. *City of Niagara Falls,* 230 App. Div. 601, 603, 245 N.Y. Supp. 510, 512; *Hamilton* v. *City of Shelbyville,* 6 Ind. App. 538, 543, 33 N.E. 1007, 1009.

shown to exist. There is no presumption in its favor. Every reasonable doubt should be resolved against it. Where it exists, it is to be rigidly scrutinized, and never permitted to extend *either in scope or duration* beyond what the terms of the concession clearly require.' There must have been a deliberate intention clearly manifested on the part of the State to grant what is claimed. Such a purpose cannot be inferred from equivocal language. . . ."

". . .

". . . If the legislature had intended to assume an obligation that it should be *kept there* in perpetuity, it is to be presumed it would have said so. We cannot—certainly not in this case—interpolate into the statute a thing so important, which it does not contain. The most that can be claimed to have been intended by the State is, that when the conditions prescribed were complied with, the county seat should be then and thereupon 'permanently established' at the designated place. We are, therefore, to consider what is the meaning of the phrase 'Permanently established.' . . . So the county seat was permanently established at Canfield when it was placed there with the *intention* that it should remain there. This fact, thus complete, was in no wise affected by the further fact that thirty years later the State changed its mind and determined to remove, and did remove, the same county seat to another locality. It fulfilled at the outset the entire obligation it had assumed. It did not stipulate *to keep* the county seat at Canfield perpetually, and the plaintiffs in error have no right to complain that it was not done. *Keeping it there* is another and a distinct thing, in regard to which the eighth section of the act is wholly silent . . ."

In the later case of *Texas & Pac. R. Co.* v. *Marshall,* 136 U. S. 393, 401, 402, 34 L. ed. 385, 388, 389, 10 Sup. Ct. 846, 847, 848, a city agreed to give the railroad company land in consideration of the railroad's agreement

"to permanently establish its eastern terminal and Texas offices at the city. . ." Nine years later the city attempted to enjoin the railroad from removing its terminus therefrom. The Court in denying the injunction states:

> "If it were not for the word 'permanent,' as found in the communication of the committee of the city of Marshall to Mr. Scott, we should not think it easy to justify the inference that the obligation was to maintain forever at that place what the company engaged to establish there. . .
>
> ". . . The object of the city might very well be supposed to have been attained by the selection of the city as a terminus of the railroad, the construction and establishment there of its offices, . . . And in point of fact it appears that for a period of about eight years they were permanently located at the city of Marshall. If, however, the city desired something more than this, if it desired to make sure that these establishments should forever remain within the limits of the city of Marshall, and that the railroad company should be bound to keep them there forever, such an extraordinary obligation should have been acknowledged in words which admitted of no controversy. It would have been very easy to have inserted into this contract language which forbade the company from ever removing the terminus of the road to some other point, or from ever removing or ceasing to use the depot, or the car and machine shops, and thus have made the obligation perpetual. . ."

It should be noted that the Supreme Court of the United States in the two foregoing cases as well as in the case of *Mead* v. *Ballard,* 74 U. S. 290, 294, 19 L. ed. 190, 192, had before it contracts which provided for the "permanent" establishment of a county seat, "permanent" establishment of an eastern terminal and "permanent" location of an institution of learning and yet in each case refused so to construe the contract as to impose upon the defendant

as perpetual obligation to perform the duties set forth therein. [2]

In *Holt* v. *Saint Louis Union Trust Co.* (C.C.A. 4th 1931) 52 F. (2d) 1068, 1069, the court in discussing the length of time for which the parties were bound by a contract which specified no particular time for its duration, quoted the following language from Williston on Contracts § 38:

> "It is not often that a promise will properly be construed as calling for perpetual performance. Only in such negative promises as to forbear suit or not to carry on a business or occupation is so broad a construction likely to be permissible. More commonly the true construction will mean some period short of infinity; and partly in order to carry out supposed actual intention of the parties and partly, doubtless, in order to prevent an offer or agreement from being ineffectual because too indefinite, courts will, where the contract contemplates a single act or exchange of acts unless the circumstances show a contrary intention, construe a promise which does not in terms state the time of performance as intending performance in a reasonable time. . . ."

In view of the foregoing authorities it is submitted that the alleged license agreement did not by its express terms designate that the County of Alameda should be perpetually bound to operate, maintain, repair and rebuild the Fruitvale Avenue Bridge and that in the absence of such an intent, expressed in unequivocal language, the district court erred in not holding that the contract was substantially performed by the said county when it accepted and assumed control of the three bridges in accordance with the resolution of November 10, 1913, and continued to

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2. Accord: *Jones* v. *Newport News* (C.C.A. 6th 1895) 65 Fed. 736, 742; *Town of Readsboro* v. *Hoosac Tunnel & W. R. Co.* (C.C.A. 2d 1925) 6 F. (2d) 733, 735; *Hasman* v. *Elk Grove Union High School*, 76 Cal. App. 629, 633, 245 Pac. 464, 466; *Dover Copper Mining Co.* v. *Doenges*, 40 Ariz. 349, 357, 12 P. (2d) 288, 292.

operate, maintain and repair the Fruitvale Avenue Bridge for a period of twenty-seven years and that the county did not in any way obligate itself to continue to operate the same for any definite period or for all time to come.

In *Union Stockyards Company* v. *Nashville Packing Company* (C.C.A. 6th 1905) 140 Fed. 701, 705, 706, the court in denying an injunction against the defendant dismantling a packing house standing on certain lands which had been conveyed to it upon the condition that it would erect, equip, operate and maintain such packing house and which the defendant proposed to abandon after a lapse of several years, stated:

> ". . . Another feature of the transaction which seems to us of much significance is that no time was fixed during which the obligation to maintain and operate the packing house should endure. It seems to be hardly reasonable to suppose that the parties could have understood that this covenant should continue to operate perpetually. . .
>
> ". . . A similar question with respect to the duration of the covenant, when there was no limitation in respect of time, has been presented in several reported cases, and the view which has been generally taken is that, when the time is not limited by the language employed, it should be implied that some limitation was intended and that it was such as the nature of the case would indicate as reasonable. Among other cases are . . . *Mead* v. *Ballard,* 7 Wall. 290, 19 L. Ed. 190; *Texas & Pacific Ry. Co.* v. *Marshall,* 136 U. S. 393, 10 Sup. Ct. 846, 34 L. Ed. 385; . . . ; *Murdock* v. *Mayor, etc., of Memphis,* 7 Cold. (Tenn.) 483. In this latter case the court expressed the opinion that the question was to be resolved upon the analogy of the general rule that, where no time is fixed, reasonable time is implied."

In *Texas & Pacific Railway Co.* v. *Scott* (C.C.A. 5th 1896) 77 Fed. 726, 731, it was held that the establishment

and maintenance of a station at a point for thirty-six years was a substantial and sufficient compliance with the terms of the contract where no particular time for such maintenance was specified.

In *Sheets* v. *Vandalia R. Co.,* 74 Ind. A. 597, 617, 127 N. E. 609, 616, the court ruled that the abandonment of property for depot purposes forty-three years after the death of the grantor would not authorize his heirs to reenter in spite of a provision in the deed that the lands were given to the defendant on condition that a railroad depot be built.

In *Maryland etc. R. Co.* v. *Silver,* 110 Md. 510, 518, 73 Atl. 297, 300, seventeen years' maintenance of a public station until the "exigencies of business, the convenience of the public and the welfare of the railroad demanded its removal" was held to constitute a fair compliance with a covenant to operate and maintain a station on a specific lot of land conveyed for that purpose.

The court in *Scheller* v. *Tacoma R. & Power Co.,* 108 Wash. 348, 354, 184 Pac. 344, 346, followed the rule laid down in *Texas & Pac. Ry. Co.* v. *Marshall, supra,* and held that the operation of a railroad for twenty-five years was a substantial compliance with a contract whereby certain lands were deeded to the railroad company in return for its promise to build and operate a railroad between certain points and the State of Washington. The court points out that the contract did not impose upon the railroad company the duty of operating the railroad in perpetuity.

In *Littlerock & Ft. S. R. Co.* v. *Birnie,* 59 Ark. 66, 81, 26 S.W. 528, 531, the question was whether the maintenance of a depot for eleven years was a sufficient compliance with a covenant contained in a grant of certain lands wherein the railroad company agreed to erect and maintain a depot on said lands. The court said it was for the

jury to say whether the time was reasonable in the sense that it gave the plaintiff full opportunity to substantially realize the benefits that at the time of the donation it reasonably had expected to accrue to it.[3]

In the light of the foregoing authorities it is submitted:

1. That in the absence of any specification of the time during which the County of Alameda was to operate, maintain, repair and rebuild the Fruitvale Avenue Bridge in return for the revocable license to control the same, it must be assumed that a reasonable time was intended.

2. That the operation, maintenance and repair of the Park Street and High Street bridges from 1913 to the date of their replacement and the operation, maintenance and repair of the Fruitvale Avenue Bridge for a period of over twenty-seven years at a cost of more than seven hundred thousand dollars, was a reasonable time for the County of Alameda to continue its obligation and was a substantial compliance with the terms of the 1909 and 1913 resolutions of the board of supervisors of Alameda County and with the conditions set forth in the revocable license of the United States Government of 1910.

C. A Contract Which Specified No Time For Its Continuance Was Terminable At the Will of Either Party.

Contracts which do not specify any particular time for which an obligation is to continue have been construed as either having been substantially performed after a reasonable time, as discussed in the foregoing section, or as being terminable at the will of either party after reasonable notice.

In *Risley* v. *City of Utica* (C.C.N.D. N.Y. 1910) 179 Fed. 875, 885, the plaintiff contended that according to a contract he was bound to furnish water for the city and

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3. An annotation in 7 American Law Reports page 817 lists numerous other cases to the effect that performance for a reasonable time is substantial compliance with a contract where no specific time is stated.

that in return the city was bound to pay $10,000 annually and also part of the company's taxes. The court stated:

> "The company did not agree to supply water for any length of time, but the city agrees to pay at the rate and on the basis stated so long as the company supplies water. . .
>
> "I have no doubt that the city of Utica, . . . may terminate such contract on giving due and reasonable notice of its election so to do. It is not a contract that can be enforced in perpetuity by either party. There is no word or clause in it that binds the company to continue to furnish water under it, and I do not think the city could compel specific performance for all time. Neither can the company. It is not mutually enforceable. Its continuance is optional, but to terminate same notice must be given and a reasonable time fixed when such termination shall take effect. . .
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> "In 3 Page on *Contracts,* p. 2110, sec. 1361, it is said:
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> " 'If no time is fixed by the contract for its duration, and the contract from its nature is one which might last indefinitely, either party may at his option terminate such contract. . . A reasonable notice of the exercise of such option must be given,' etc."

In *Childs* v. *City of Columbia,* 87 S.C. 566, 572, 70 S.E. 296, 298, the court said:

> ". . . there is no allegation whatever that the plaintiff was bound to take, or that the city was bound to furnish, water for any specified time. Where the parties to a contract express no period for its duration, and no definite time can be implied from the nature of the contract or from the circumstances surrounding them, it would be unreasonable to impute to the parties an intention to make a contract binding themselves perpetually. In such a case the courts hold with practical unanimity that the only reasonable intention that can be imputed to the parties is that the contract may be terminated by either, on giving reasonable notice of his intention to the other."

So too in *Mass. Bonding & Ins. Co.* v. *Simonds,* 226 Mo. A. 1071, 1078, 49 S.W. (2d) 645, 648, the court stated:

> "A contract will be construed to impose an obligation in perpetuity only 'when the language of the agreement *compels* that construction.' . . . The general rule is that an agreement, which neither expressly nor by implication has any time fixed for it to expire, is terminable at the will of either party." [4]

If the appellant's theory is correct that the consideration for the operation and maintenance of the bridges was the revocable license granted by the federal government for the control of said bridges by Alameda County, then the contract is unenforceable because of lack of mutuality. If, however, we assume for the sake of argument only that the Government's theory is correct and that the establishment of harbor lines, the opening of the land to leasing and the electrification of the bridges was the consideration, then the equities are still with the appellant, for the establishment of the harbor lines and the leasing of the land were not only revocable at the will of the Government but were actually revoked in or before 1929. Furthermore the cost of the electrification was $22,000 or less, whereas the County of Alameda has expended over $700,000 in operating the bridges to date. It must be conceded that the Government received many times the benefit which it contemplated or even dared hope for. There can be no question that Alameda County has continued its obligation for a long enough time to fully compensate the Government for any expenditure it might have made.

The alleged license agreement is identical on its facts with those referred to in the foregoing cases and on the

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4. Accord: *Joliet Bottling Co.* v. *Joliet Citizens' Brewing Co.,* 254 Ill. 215, 219, 98 N.E. 263, 265; *Victoria Limestone Co.* v. *Hinton,* 156 Ky. 674, 676, 161 S.W. 1109, 1110; *Dunn* v. *Birmingham Stove & Range Co.,* 170 Okla. 452, 453, 44 P. (2d) 88, 89; *McCullough-Dalzell etc. Co.* v. *Philadelphia Co.,* 223 Pa. 336, 342, 72 Atl. 633, 636; *Bailey* v. *S. S. Stafford, Inc.,* 166 N.Y. Supp. 79, 82; *Cronk* v. *Vogt's Ice Cream, Inc.,* 15 N.Y. Supp. (2d) 649, 652.

basis of their authority it is submitted that it was terminable at the will of either party upon reasonable notice to the other and hence was terminated by the written notice of the board of supervisors dated September 28, 1939 addressed to the United States Government and notifying it that at midnight on December 31, 1939 the County of Alameda would cease to operate Fruitvale Avenue Bridge.

It is a well established rule of law that equity will not undertake to enforce a contract extending into perpetuity. In other words equity will not undertake to supervise the specific performance of a contract such as the one here under discussion extending over a term of years and involving a mass of detail in its execution.

This rule was expressed by the United States Supreme Court in *Texas & Pacific Ry. Co.* v. *Marshall,* 136 U.S. 393, 405, 406, 34 L. ed. 385, 390, 10 Sup. Ct. 846, 849, wherein the Court said:

> "But we are further of opinion, that if the contract is to be construed as the appellant insists it should be construed, it is not one to be enforced in equity. We have already shown that to decree the specific enforcement of this contract is to impose upon the company an obligation, without limit of time, to keep its principal office of business at the city of Marshall, . . .
>
> "It appears to us that if the city of Marshall has under such a contract a remedy for its violation, it is much more consonant to justice that the injury suffered by the city should be compensated by a single judgment in an action at law, and the railroad placed at liberty to follow the course which its best interests and those of the public demand. . .
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> ". . .
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> ". . . It (the court) must be liable to perpetual calls in the future for like enforcement of the contract, and it assumes, in this way, an endless duty, inappropriate to the functions of the court, which is as ill-calculated to do this as it is to supervise and enforce a contract

for building a house or building a railroad, both of which have in this country been declared to be outside of its proper functions, and not within its powers of specific performance."

The potential amount of litigation involved in specifically enforcing the performance of a contract such as the one at bar would be even greater than that in *Texas & Pacific Ry. Co.* v. *Marshall, supra.* The following facts indicate the complexity of the contract herein sought to be specifically enforced:

1. That the bridge extends over navigable waters owned by the United States and hence subject to the control of the federal government for all time to come;
2. That the actual title to the bridge and the land under the bridge is in the federal government.
3. That the United States Government has established a naval base in the city of Alameda and that the Fruitvale Avenue bridge furnishes the only means whereby supplies may be carried by rail to that base, making the maintenance of that bridge a matter of vital and ever increasing importance to the government.
4. That the bridge is used not only for vehicular but for railroad purposes and that the Southern Pacific Company has a perpetual right of way over said bridge.
5. That the license specifically provides that a franchise shall not be exclusively granted to any one railroad company.
6. That the bridge is operated by the County of Alameda between two cities, namely, Oakland and Alameda, and that the needs and demands of said cities are constantly growing and changing.

In an annotation in 68 American State Reports 753, 755, the annotator states:

> "There are two classes of cases in which, in a suit for the specific performance of a contract, equity will refuse to grant a decree, although there is no question

as to the validity, certainty, mutuality, or justice of the contract, and although there is no doubt that the defendant is entirely able to, and in all justice should, perform his contract. . . The second class, . . . embraces the numerous cases in which, by reason of the nature of the thing contracted to be done, a decree of specific performance must prove an ineffective or inexpedient remedy. . . Accordingly, where the enforcement of a decree of specific performance would unduly tax the attention and superintendence of the court; where it would necessitate the compelling of personal acts involving the exercise of special skill, taste, or judgment; where the performance of the contract must stretch over a considerable time; where the contract is so complex in its nature that it would be difficult in any case to determine whether an alleged disobedience of the court's decree was in fact a disobedience, . . . in all these cases, by the general rule, a decree of specific performance will be refused. . .

". . . Specific performance of a contract will not be decreed where the contract is perpetual: *Texas etc. Ry. Co.* v. *Marshall,* 136 U.S. 393; *McCarter* v. *Armstrong,* 32 S.C. 203. . .

"Perhaps the most important subdivision of the class of cases under consideration is that of building and construction contracts. . .

"The most interesting and important cases in this connection are those growing out of contracts for the construction, operation, and repair of railroads. Many of these contracts are most intricate and complex in their provisions, and extend their performance over long periods of time. Perhaps the leading case of this sort in the United States is that of *Ross* v. *Union Pac. Ry. Co.,* 1 Woolw. 26. . . ."

In *Ross* v. *Union Pac. Ry. Co.,* 20 Fed. Cas. p. 1245, 1250, Mr. Justice Miller said:

". . . I am inclined to concur fully with Judge Story, that 'in cases of contract to build a house or a bridge'

or I will venture to add, a railroad, 'a specific performance would not now be decreed'. 2 Story eq Jur. Sec. 716, Note 2.

". . . And this (the continuous and complicated nature of work to be done) may have been a reason, and a very strong reason, for the rule, now well settled, that a covenant to repair will not be specifically enforced." [5]

An alleged license agreement such as the one now before this court extending over an indefinite and uncertain period of time and purporting to bind the County of Alameda to operate, maintain, repair and if necessary rebuild the Fruitvale Avenue Bridge under the supervision of the Engineer's Office of the United States Army presents a situation more complex and uncertain than that presented in any of the foregoing cases where the courts have denied specific performance.

The prayer of the Government should therefore be denied.

V.

THE CONCLUSION OF LAW CONTAINED IN PARAGRAPH V OF "CONCLUSIONS OF LAW" THAT "CONGRESS HAD AND HAS POWER TO AUTHORIZE THE COUNTY TO OPERATE, MAINTAIN, REPAIR AND REBUILD THE FRUITVALE AVENUE BRIDGE" IS ERRONEOUS AND THE COURT SHOULD HAVE CONCLUDED AS A MATTER OF LAW THAT THE CONGRESS OF THE UNITED STATES HAS NOT NOW, AND NEVER HAS HAD THE POWER TO AUTHORIZE SAID COUNTY OF ALAMEDA TO OPERATE, MAINTAIN, REPAIR OR REBUILD SAID FRUITVALE AVENUE BRIDGE (APPENDIX p. xxxii).

Municipal corporations have only such powers as are expressly conferred by the constitution or statutes of the state or as are necessarily incident to those expressly

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5. Accord: *Long Beach Drug Company* v. *United Drug Company*, 13 Cal. (2d) 158, 171, 88 P. (2d) 698, 704; *York Haven Water & Power Co.* v. *York Haven* (C.C.A. 3rd 1912) 201 Fed. 270, 278; *United Cigarette Machine Co.* v. *Winston Cigarette Machine Co.*, (C.C.A. 4th 1912) 194 Fed. 947, 958.

granted or are essential to the declared objects and purposes of the municipal corporation.

Egan v. *San Francisco,* 165 Cal. 576, 582, 133 Pac. 294, 296; *Hurst* v. *City of Burlingame,* 207 Cal. 134, 138, 277 Pac. 308, 311; *County of Alameda* v. *Ross,* 32 Cal. App. (2d) 135, 146, 89 P. (2d) 460, 465; *In re Valley Deposit and Trust Co.,* 311 Pa. 495, 497, 498, 167 Atl. 42, 43; *Utah Rapid Transit Co.* v. *Ogden City,* 89 Utah 546, 550, 58 P. (2d) 1, 3; *Mineral County Court* v. *Town of Piedmont,* 72 W. Va. 296, 298, 78 S.E. 63; and 1 Dillon, *Municipal Corporations* (5th ed.) sec. 237.

Political subdivisions of a state are created to carry on certain functions which, though limited in their scope, are in their performance as much an exercise of sovereignty as when the corporate state itself exercises its universal sovereignty. As was said in the *City of Bisbee* v. *Cochise County,* 52 Ariz. 1, 13, 78 P. (2d) 982, 986:

> ". . . These subordinate bodies are created by virtue of the sovereignty resting in the state; they draw all their powers from that sovereignty, and *are created for the sole purpose of exercising the limited part of sovereignty delegated to them.* We cannot conceive of a county, a municipal corporation, or a school district as exercising any functions whatever except by right of such delegated sovereignty, and it is solely for the purpose of promoting the common weal of its citizens, either of the state as a whole or of the particular subdivision thereof in question, that such power is delegated."

The United States Supreme Court has on innumerable occasions said that the powers of the general government are only those specifically enumerated in the Constitution and such implied powers as are necessary and proper to carry into effect the enumerated powers. The Tenth Amendment to the Constitution expressly declares: "The powers not delegated to the United States by the Consti-

tution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Nowhere in the Constitution of the United States is Congress given authority to bestow powers on a subdivision of a state or to enlarge the express powers of such subdivision or to nullify an express limitation which the state has imposed upon the power of such subdivision. The state is sovereign within its own sphere of jurisdiction.

In *Ashton* v. *Cameron County District,* 298 U. S. 513, 528, 531, 80 L. ed. 1309, 1312, 1314, 56 Sup. Ct. 892, 895, 896, the United States Supreme Court in holding unconstitutional the amendment to the Bankruptcy Act extending the benefits of the act to political subdivisions of the state on the ground that the amendment encroached upon state powers stated:

> ". . . Its fiscal affairs are those of the state, not subject to control or interference by the national government, unless the right so to do is definitely accorded by the Federal Constitution.
>
> ". . .
>
> "Neither consent nor submission by the states can enlarge the powers of Congress; none can exist except those which are granted. *United States* v. *Butler,* 297 U. S. 1 . . . The sovereignty of the state essential to its proper functioning under the Federal Constitution cannot be surrendered; it cannot be taken away by any form of legislation. See *United States* v. *Constantine,* 296 U. S. 287 . . .
>
> "Like any sovereignty, a state may voluntarily consent to be sued; may permit actions against her political subdivisions to enforce their obligations. Such proceedings against these subdivisions have often been entertained in federal courts. But nothing in this tends to support the view that the federal government, acting under the bankruptcy clause, may impose its will and impair state powers—pass laws inconsistent with the idea of sovereignty."

In *Carter* v. *Carter Coal Co.,* 298 U. S. 238, 294, 80 L. ed. 1160, 1180, 56 Sup. Ct. 855, 865, Justice Sutherland said:

> ". . . While the states are not sovereign in the true sense of that term, but only *quasi*-sovereign, yet in respect of all powers reserved to them they are supreme—'as independent of the general government as that government within its sphere is independent of the States.' *Collector* v. *Day,* 11 Wall. 113, 124. . . It is no longer open to question that the general government, unlike the states, *Hammer* v. *Dagenhart,* 247 U. S. 251, 275, possesses no *inherent* power in respect of the internal affairs of the states; and emphatically not with regard to legislation . . .
>
> "The determination of the Framers Convention and the ratifying conventions to preserve complete and unimpaired state self-government in all matters not committed to the general government is one of the plainest facts which emerge from the history of their deliberations. And adherence to that determination is incumbent equally upon the federal government and the states. State powers can neither be appropriated on the one hand nor abdicated on the other. . ."

A county or other political subdivision of a state derives none of its powers from the United States and the mere fact that such subdivision attempts to enter into an alleged contract with the federal government which is beyond the power granted to it by the state does not automatically increase the county's power to execute such agreement.

In *Arkansas-Missouri Power Co.* v. *City of Kennett, Mo.,* (C.C.A. 8th, 1935) 78 F. (2d) 911, 922, the court said:

> ". . . The city derives none of its powers from the United States. It is a creature of the state of Missouri and has only such powers as the state has given it. The relation of the United States to the City is no different than would be the relation to it of any individual, cor-

poration, foreign state, or foreign sovereignty which had made a similar arrangement for financing the city with respect to the construction of public works. If the city could lawfully enter into this agreement with the United States, we think it could lawfully have entered into a similar agreement with any entity having power to contract."

So in *State ex rel. Cole* v. *Keller,* 129 Fla. 276, 286, 287, 288, 176 So. 176, 180, the court said:

"We find no authority on the part of the city to impose such a tax. It is not within the budgetary requirements of the city and is shown to be an attempt to raise and expend tax funds for a purpose not contemplated by the annual budget . . .

". . .

". . . The Legislature is the source of the municipalities' power, and such as does not flow from it is not vested . . .

". . .

"The law seems settled that the Federal Government through agencies provided by it may make loans to a county or municipality to construct or aid in the construction of municipal or county projects. *Greenwood County* v. *Duke Power Company* (C.C.A.) 81 F. (2d) 986, but such a power does not, *sua sponte,* clothe the county or municipality with authority to contract with the Federal Government or its agencies. Such contracts must be made in the same manner and under the same authority as contracts with individuals. *Arkansas-Missouri Power Company* v. *City of Kennett* (C.C.A.) 78 F. (2d) 911."

Congress has no power to amend state legislation (*Public Service Com'n.* v. *New York Cent. R. Co.,* 185 N.Y. Supp. 267, 271, 274, 194 App. Div. 254).

It therefore follows that the district court's conclusion of law that Congress had and has power to authorize the County of Alameda to operate, maintain, repair and rebuild the Fruitvale Avenue Bridge, not in furtherance of

any power expressly or impliedly granted to said county by the constitution or statutes of the State of California or the charter of said county but in derogation of the express prohibition of section 31 or article IV of the state constitution, prohibiting a county from making a gift of public money to any private person or corporation, and of section 18 of article XI of said constitution, providing that no county shall incur any indebtedness for any purpose exceeding in any year the income and revenue provided for such year without the consent of two-thirds of the qualified voters thereof, is obviously erroneous.

VI.

THE CONCLUSION OF LAW CONTAINED IN PARAGRAPH III OF "CONCLUSIONS OF LAW" THAT "THE COUNTY OF ALAMEDA IS NOW ESTOPPED TO SET ASIDE ITS CONTRACT WITH THE UNITED STATES TO MAINTAIN, OPERATE, REPAIR AND REBUILD FRUITVALE AVENUE BRIDGE" IS ERRONEOUS AND THE COURT SHOULD HAVE CONCLUDED AS A MATTER OF LAW THAT THE ALLEGED CONTRACT WAS ULTRA VIRES AND THAT THE SAID COUNTY OF ALAMEDA IS NOT NOW AND NEVER HAS BEEN ESTOPPED TO SET ASIDE SAID ALLEGED CONTRACT (APPENDIX p. xxxi).

In other sections of this brief the appellant has established that the alleged license agreement was *ultra vires* and void for each of the following reasons:

1. The County of Alameda and its board of supervisors were without constitutional or statutory power, express or implied, to execute the same (App. Br. 16-29);

2. Section 18 of Article XI of the California Constitution expressly prohibits said county from incurring the liability contemplated thereunder which was in excess of the year's income (App. Br. 29-41);

3. Section 31 of Article IV of the California Constitution and the due process clause of the United States Constitution prohibts said county from making the gift

therein provided of its tax moneys to a private railroad corporation or the United States (App. Br. 42-54); and

4. Said county and its board of supervisors were prohibited from entering into a perpetual contract (App. Br. 54-75).

We therefore submit that neither the County of Alameda nor its board of supervisors was acting within the scope of its authority when in 1909 and 1913 said county or said board adopted resolutions concerning the operation, maintenance, repair and replacement of the Fruitvale Avenue Bridge and that therefore the doctrine of equitable estoppel has no application to the alleged license agreement.

The Supreme Court of California has consistently held that neither the state nor a political subdivision thereof is equitably estopped to deny the validity of a contract or agreement which was beyond it power to execute.[1]

In *Los Angeles Dredging Co.* v. *Long Beach,* 210 Cal. 348, 353, 291 Pac. 839, 842, the court stated:

> "Certain general principles have become well established with respect to municipal contracts, and a brief statement of these principles will serve to narrow the field of our inquiry here. The most important one is that contracts *wholly beyond the powers of a municipality are void. They cannot be ratified; no estoppel to deny their validity can be invoked against the municipality;* and ordinarily no recovery in *quasi* contract can be had for work performed under them. . ." (Emphasis added.)

In *Wichmann* v. *City of Placerville,* 147 Cal. 162, 164, 81 Pac. 537, 538, the court stated:

> "The proposition that charters of municipal corporations are special grants of power from the sovereign authority and are to be strictly construed, and that

1. *Berka* v. *Woodward,* 125 Cal. 119, 122, 57 Pac. 777, 779; *Foxen* v. *City of Santa Barbara,* 166 Cal. 77, 81, 134 Pac. 1142, 1143; *Reams* v. *Cooley,* 171 Cal. 150, 153, 152 Pac. 293, 294; *City of Pasadena* v. *Estrin,* 212 Cal. 231, 235, 298 Pac. 14, 15; *County of Shasta* v. *Moody,* 90 Cal. App. 519, 523, 265 Pac. 1032, 1034; and *Miller* v. *City of Martinez,* 28 Cal. App. (2d) 364, 370, 82 P. (2d) 519, 523.

whatever power is not given expressly, or as a necessary means to the execution of expressly given powers, is withheld, is a proposition too well settled to call for discussion. (*Douglas* v. *Mayor of Placerville,* 18 Cal. 645.) Equally well settled is it that want of power is always a defense to a municipal corporation, and that no estoppel, by conduct or by ratification, to raise the question of want of power, can be urged against such corporation. This last is a rule of necessity. . . ."

The danger of applying the rule of estoppel to contracts which are beyond the power of a county or a municipal corporation to make was pointed out in *City of Arcata* v. *Green,* 156 Cal. 759, 764, 106 Pac. 86, 88, wherein the court stated:

". . . A party contracting with a city regarding a subject-matter within the scope of the city's powers may, where he has received the benefit of the contract, be precluded from asserting that the contract was not, on the part of the city, executed in the manner required by law. The doctrine, however, cannot be made to cover contracts *entirely beyond the range of the municipal authority.* 'If this doctrine be established, then corporations, no matter how limited their powers, may make themselves omnipotent. They have only to induce persons to contract with them beyond the scope of their powers, and their very usurpations have the effect of conferring powers on them which the legislature has withheld. A proposition so erroneous can scarcely need argument to overturn it . . . We cannot apply the doctrine of estoppel to such a case as this.' (*City Council* v. *Montgomery etc. Co.,* 31 Ala. 76.)"

Numberous recent cases from other jurisdictions might be cited in support of the foregoing propositions.[2]

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2. *Town of Conway* v. *Atlantic Coast Line R. Co.,* (D.C., E.D.S.C., 1926) 20 F. (2d) 250, 257; *Hoskins* v. *City of Orlando,* (C.C.A. 5th 1931) 51 F. (2d) 901, 904; *Hope* v. *City of Alton,* 214 Ill. 102, 106, 73 N.E. 406, 407; *American Oil Co.* v. *Marion County,* 187 Miss. 148, 158, 192 So. 296, 299; *In re Rosa's Estate,* 16 N.Y. Supp. (2d) 285, 288, 172 Misc. 808.

A number of cases might be cited to the effect that a court of equity will not enforce an alleged contract which violates a debt limitation provision of the state constitution and that there is no estoppel on the part of the state or of its political subdivision to deny the validity of such a contract.

The Supreme Court of the United States in *District Township of Doon* v. *Cummins,* 142 U.S. 366, 371, 375, 376, 35 L. ed. 1044, 1046, 1047, 1048, 12 Sup. Ct. 220, 221, 223, stated:

> "The scope and meaning of this provision of the fundamental and paramount law of the state are clear and unmistakable. No municipal corporation 'shall be allowed' to contract debts beyond the constitutional limit. When that limit has been reached, no debt can be contracted 'in any manner or for any purpose.' . . .
>
> ". . .
>
> "The constitution of Colorado of 1876, art. 11, sec. 6, provides that the indebtedness contracted in any one year, by any county . . . shall not exceed a certain per cent on its assessed valuation, and that 'the aggregate amount of indebtedness of any county, for all purposes, exclusive of debts contracted before the adoption of this constitution, shall not at any time exceed twice the amount above herein limited.' This court held in *Lake Co.* v. *Rollins,* 130 U. S. 662, that this provision limited the power of the county to contract debts for any purpose whatever; and in *Lake County* v. *Graham,* 130 U. S. 674, that the county was not estopped, as against a *bona fide* holder for value, to show that the constitution had been violated by issuing bonds . . .
>
> "It is hardly necessary to add that the payment of some installments of interest cannot have the effect of ratifying bonds issued beyond the constitutional limit; for a ratification can have no greater effect than a previous authority; and debts which neither the dis-

trict nor its officers had any power to authorize or create cannot be ratified or validated by either of them, by the payment of interest, or otherwise. . ." [3]

In the recent case of *Cameron County Water Improvement Dist. No.* 8 v. *De La Vergne Engine Co.* (C.C.A. 5th 1937) 93 F. (2d) 373, 375, 376, the court in denying the right of the plaintiff to recover the purchase price of machinery for which an expenditure was made in excess of the debt limitation clause of the Texas constitution, stated:

"The appellee relies strongly upon ratification and estopel; but neither may be invoked to enforce a contract entered into in violation of a constitutional provision which was intended to safeguard taxpayers against such financial difficulties as now envelop this improvement district by reason of its having ignored the statutory scheme requiring it either to sell the bonds and purchase equipment for cash, or to exchange them for property. . .

". . . we have pointed out that these plain requirements of the Constitution and laws of the state are for the security of the taxpayers, and courts are not at liberty arbitrarily to set them aside where the district has received the benefits of a contract which it had no power to make . . . *Hughson* v. *Crane,* 115 Cal. 404, 47 P. 120; *Litchfield* v. *Ballou,* 114 U. S. 190, 5 S. Ct. 820, 29 L. Ed. 132; . . .

". . . Fundamental laws to correct evils, made upon great deliberation and in the most solemn manner, should not be evaded by strained and overlearned refinements, but should be liberally construed with the evils in mind which were intended to be corrected."

The California Supreme Court in *Higgins* v. *San Diego Water Company,* 118 Cal. 524, 554, 555, 45 Pac. 824, 831,

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3. Accord: *Dixon County* v. *Field,* 111 U.S. 83, 89, 92, 28 L. ed. 360, 362, 363, 4 Sup. St. 315, 317, 318; *Hedges* v. *Dixon County,* 150 U. S. 182, 192, 37 L. ed. 1044, 1048, 14 Sup. Ct. 71, 73; *Gillette-Herzog Mfg. Co.* v. *Canyon County* (C.C.D. Idaho C.D. 1898) 85 Fed. 396, 398; and *McAleer* v. *Angell,* 19 R.I. 688, 694, 36 Atl. 588, 590.

832, specifically held that a city was not estopped to deny the validity of a contract, even so far as executed, which contract provided for an indirect subsidy to a private railroad in violation of section 31 of article IV of the California Constitution, in spite of the fact that the city had required the water company, in pursuance of the terms of the alleged contract, to expend more than $100,000 for improvements.

The appellant has previously discussed the proposition that equity will not decree specific performance of a perpetual contract (App. Br. pp. 72-75).

In view of the foregoing authorities it is submitted that the purported contract between the United States and the County of Alameda was *ultra vires* and void and that the County of Alameda could not at any time have ratified the contract and is not now, and never has been estopped to deny the validity of the alleged agreement, particularly in view of the fact that the amount expended by the Government, to wit, the sum of $21,000, for the electrification of the bridges (Tr. 135, 263) has been repaid by the County of Alameda thirty-four times during the past twenty-seven years.

VII.

THE CONCLUSION OF LAW CONTAINED IN PARAGRAPH VIII OF "CONCLUSIONS OF LAW" THAT "THE CONTRACT BETWEEN THE UNITED STATES AND THE COUNTY OF ALAMEDA IS NOT VOID FOR LACK OF MUTUALITY" IS ERRONEOUS AND THE COURT SHOULD HAVE CONCLUDED AS A MATTER OF LAW THAT THE ALLEGED CONTRACT BETWEEN THE UNITED STATES AND THE COUNTY OF ALAMEDA WAS VOID FOR LACK OF MUTUALITY (APPENDIX p. xxxiii).

If the negotiations between the United States Government and the County of Alameda between the years 1909 and 1913 constitute a contract and not a mere license, as the appellant contends, then the resolution of 1909 must

be construed as an offer, the license of 1910 as a counter offer and hence as a rejection of the offer of 1909, and the resolution of 1913 as an acceptance of said counter offer, and the three documents collectively must be considered as the constituent parts of a bilateral executory contract. The consideration for the execution of the alleged contract by the County of Alameda was the Government's granting to the county the control of the three bridges.

The 1910 license made no reference to the establishment of harbor lines nor to the leasing of the waterfront (Tr. 170). The 1909 resolution states that the county agrees to accept the bridges "provided that they and each of them be placed in such condition and repair by the United States of America prior to such acceptance by the said County of Alameda, in the State of California, that said bridges and each of them may be operated by electricity, and provided further that the United States shall, under such terms and conditions as it may see fit, lease the water front of the Tidal Canal and establish harbor lines so as to permit the construction of wharves and docks." (Tr. 168-169).

The 1913 resolution of the board of supervisors in its preamble refers to the above quoted language of the prior resolution of 1909 but the acceptance of the bridges and the assumption of their control is subject, not to the conditions set forth in the resolution of 1909 but "to the conditions and provisions of the aforesaid license of September 3, 1910." (Tr. 175).

Thus it is seen that the ultimate agreement, if any, was not to be bound by the terms contained in the original offer of 1909 but by the terms contained in the counter offer of the Government as set forth in the license of 1910; that said license did not refer to harbor lines nor leases; that the Government was therefore not bound either to establish harbor lines nor to lease the water front of the Tidal

Canal; that if it had done so, it reserved the right to do so "under such terms and conditions as it might see fit" which meant to do nothing if it so "saw fit", and also that it reserved the right to revoke such harbor lines and leases at will, a right which it actually exercised prior to 1929 (Tr. 446). The consideration for the county's promise to operate, maintain, repair and rebuild the bridges, if any, is therefore whittled down to one of two things: the electrification of the bridges and/or the license to control the same.

That the electrification was not the consideration is conclusively established by the documents themselves. The operative part of the license of 1910 reads in part as follows:

> ". . . the Secretary of War hereby grants unto THE BOARD OF SUPERVISORS OF ALAMEDA COUNTY, CALIFORNIA, A LICENSE revocable at will be the Secretary of War . . .
>
> "THIS LICENSE is granted subject to the following conditions and provisions:"
>
> ". . .
>
> "3.—That the United States shall put all three bridges in condition for operation of their draws by electrical power, . . ." (Appendix p. ——).

Note the language: The Secretary of War hereby *grants* unto the board of supervisors of Alameda County, California, a license . . . subject to the following conditions and provisions. The third provision is that the United States Government shall electrify the bridges. Under what theory of reasoning may we conclude that this condition was any different than the four other conditions upon which the license was granted? Upon what theory are we justified in considering that the third condition is the object rather than an incident of the contract?

Suppose A agrees to grant to B in fee certain real property and the improvements and appurtenances thereon for

the sum of ten thousand dollars and as an added inducement agrees to paint the barn on said property before possession is delivered. Later it develops that A owns only an estate for years in the property and B therefore refuses to go through with the contract. A sues B for the purchase price of the property and B sets up the defense that A's estate is not an absolute one. A counters with the reply that though the estate is not one in fee, still he has painted the barn at a cost of approximately one hundred dollars. Would any court of equity decree the specific performance of such a contract by B? It is obvious that such a defense would be frivolous for it is apparent on its face, first, that the parties did not intend that the painting of the barn should be the consideration for the purchase price of ten thousand dollars and, secondly, that the painting of the barn is of no benefit to B unless he can enjoy absolute possession of the realty, including the incidental condition that the barn be in good repair.

In the instant case, the electrification of the bridges was a mere incident of the contract, a minor stipulation subordinate to the real object for which the contract was entered into, to wit, the control of the bridges by the County of Alameda. Had the County of Alameda merely wanted to have the bridges operated by electricity, it does not seem reasonable to suppose that it would have been willing to pay over $700,000 plus all the future costs involved, for work costing a paltry sum of $21,000. It is only reasonable to suppose that the county would rather have sought to bind the government to an agreement whereby the county would have paid the cost of electrifying the bridges and the federal government would have continued to operate, maintain, repair and rebuild the same as it was already bound to do by the decision in the *Crooks* case. The County of Alameda was seeking the right to control the bridges so as to operate them in a manner best

suited to the needs of two rapidly growing industrial cities —Oakland and Alameda—without interference from any other governmental agency. This was the conclusion of the District Court of Appeal in *County of Alameda* v. *Ross,* 32 Cal. App. (2d) 135, 146, 89 P. (2d) 460, 465, when it stated:

> "There is no merit in the petitioner's contention that the installation of electrical apparatus by the government for the opening and closing of the draw-bridges, under the terms of the license prior to its execution, furnishes an independent consideration which makes the agreement binding. It still lacks mutuality. . ."

The license was the grant of a privilege to Alameda County to remove an obstruction to navigation caused by the Park Street, High Street and Fruitvale Avenue Bridges. That such obstruction existed did not mean that the Tidal Canal was not navigable in its natural state nor prior to 1913 or was not capable of being made navigable. It did mean that navigation was hindered and delayed by three cumbersome and antiquated bridges which could only be opened at great expense and after a long delay. This control of the bridges and the right to operate them for the benefit of the county was the consideration, and the sole consideration, which the county was seeking in its original offer of 1909 and for which it agreed to be bound by the resolution of 1913.

However, the right to control the bridges as set forth in the grant from the War Department is subject to revocation at the will of the Secretary of War. In other words, the grant of the authority over the bridges might be revoked at any time without cause. Whereas it may be assumed that the government would not revoke the license without some good reason, the fact remains that the determination of what constitutes a good reason was solely within the discretion of the government and should the license be revoked at any time for any or no cause,

the county would be entirely without legal redress. It is submitted that such an alleged contract subject to revocation by one party at will is lacking in mutuality, is without consideration and is therefore void.

In 1 Williston on Contracts (Rev. ed. 1936) commencing at page 123 section 43 it is stated:

> "One of the commonest kind of promises too indefinite for legal enforcement is where the promisor retains an unlimited right to decide later the nature or extent of his performance. This unlimited choice in effect destroys the promise and makes it merely illusory. . .
>
> ". . . But a promise to give anything whatever which the promisor may choose, or to do or give something whenever the promisor pleases, is illusory, for such promises would be satisfied by giving something so infinitely near nothing or by performance so infinitely postponed as to have no calculable value. For the same reason if one party to an agreement reserves an unqualified right to cancel the bargain no legal rights can arise from it while it remains executory. . ."

Page 352 section 104 reads:

> ". . . And in any case where a promise in terms or in effect provides that the promisor has a right to choose one of two alternatives, and by choosing one will escape without suffering a detriment or giving the other party a benefit, the promise is insufficient consideration. The same consequence follows where a bilateral agreement in question expressly reserves to one party the right of immediate cancellation at any time. . ."

Page 365 section 105 further said:

> ". . . That a promise which in terms reserves the option of performance to the promisor is insufficient to support a counter-promise is well settled. And the promise is no more effectual because the condition contained in it is in the form a condition subsequent rather than a condition precedent. As has been seen an agree-

ment which one party reserves the right to cancel at his pleasure cannot create a contract."

The above language is quoted in *County of Alameda* v. *Ross,* 32 Cal. App. (2d) 135, 145, 89 P. (2d) 460, 464. There the court said:

". . . In the present case there is an absolute absence of mutuality for the reason that the government may cancel the agreement and deprive the County of Alameda of the use or control of the bridges at any moment without cause. In 13 Corpus Juris, page 337, section 188, it is said:

" 'Where one party reserves an absolute right to cancel or terminate the contract at any time mutuality is absent. . .' . . .

". . . A careful reading of the document leaves no doubt it was the intention of the government, clearly expressed in unequivocal language, that it reserves the absolute right to revoke the license at will with or without cause. It contains no limitation whatever upon that arbitrary power. It is therefore void for lack of mutuality and for lack of consideration."

The federal courts have closely adhered to the foregoing well established statements of the law. The United States Supreme Court in *Marble Co.* v. *Ripley,* 10 Wall. 339, 359, 19 L. ed. 955, 962, said:

"Another reason why specific performance should not be decreed in this case is found in the want of mutuality. Such performance by Ripley could not be decreed or enforced at the suit of the marble company, for the contract expressly stipulates that he may relinquish the business and abandon the contract at any time on giving one year's notice. And it is a general principle that when, from personal incapacity, the nature of the contract, or any other cause, a contract is incapable of being enforced against one party, that party is equally incapable of enforcing it specifically against the other, though its execution in the latter way

might in itself be free from the difficulty attending its execution in the former."

In *Southern Express Co.* v. *Railroad Co.,* 99 U. S. 191, 200, 25 L. ed. 319, 321, the court said:

"But we need not pursue the subject further, because there is one provision of the contract in this case which is fatal to the relief sought. A court of equity never interferes where the power of revocation exists. . ."

In *Willard, Sutherland & Co.* v. *United States,* 262 U.S. 489, 493, 67 L. ed. 1086, 1088, 43 Sup. Ct. 592, the Supreme Court of the United States held that a contract wherein it was provided that "it shall be distinctly understood and agreed that . . . the contractor will furnish and deliver any quantity of the coal specified . . . which may be needed . . . irrespective of the quantity stated, *the government not being obligated to order any specific quantity.* . ." was void for lack of mutuality and consideration.[1]

In numerous other federal cases the courts have held that contracts containing cancellation clauses were void for lack of mutuality.[2]

A number of the foregoing authorities were cited in the case of *County of Alameda* v. *Ross,* 32 Cal. App. (2d) 135, 141-145, 89 P. (2d) 460, 462-465, wherein the court had before it the same documents which are now be-

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1. The same rule was laid down in *William C. Atwater & Co. Inc.* v. *United States,* 262 U.S. 495, 498, 67 L. ed. 1089, 1090, 43 Sup. Ct. 595, 296.

2. *Cold Blast Transportation Co.* v. *Kansas City Bolt & Nut Co.,* (C.C.A. 8th 1902) 114 Fed. 77, 79; *Velie Motor Car Co.* v. *Kopmeier Motor Co.,* (C.C.A. 7th 1912) 194 Fed. 324, 330; *Oakland Motor Car Co.* v. *Indiana Automobile Co.,* (C.C.A. 7th 1912) 201 Fed. 499, 503; *Ellis* v. *Dodge Bros.,* (D.C. N.D. Ga. 1916) 237 Fed. 860, 867; *City of Pocatello* v. *Fidelity and Deposit Co of Maryland,* (C.C.A. 9th 1920) 267 Fed. 181, 182; *Miami Coca-Cola Bottling Co.* v. *Orange Crush Co.,* (C.C.A. 5th 1924) 296 Fed. 693, 694; *Curtiss Candy Co.* v. *Silberman,* (C.C.A. 6th 1930) 45 F. (2d) 451, 452; *Ford Motor Co.* v. *Kirkmyer Motor Co.,* (C.C.A. 4th 1933) 65 F. (2d) 1001, 1003; *E. I. DuPont DeNemours & Co.* v. *Claiborne-Reno Co.,* (C.C.A. 8th 1933) 64 F. (2d) 224, 232; *Motor Car Supply Company* v. *General Household Utilities Co.,* (C.C.A. 4th 1935) 80 F. (2d) 167, 170; *Terre Haute Brewing Co.* v. *Dugan,* (C.C.A. 8th 1939) 102 F. (2d) 425, 427.

ing considered by this Court and where the court held that the contract was void for lack of mutuality and stated:

"We are of the opinion the license from the United States does not authorize the County of Alameda to incur indebtedness or to expend public money in repairing or maintaining that portion of the Fruitvale Avenue Bridge which is used exclusively for the benefit of the Southern Pacific Railroad Company, for the reason that the license is revocable at will by the Secretary of War and therefore lacks mutuality of obligations and consideration, which renders it void. . .

"The license in question is an executory agreement authorizing the County of Alameda to retain the use and operation of the estuary bridges for an indefinite length of time, subject, however, to the control of the Secretary of War, and absolutely revocable at his will without cause therefor. It is apparent from the terms of the license that the County of Alameda will soon be called upon to reconstruct the Fruitvale Avenue Bridge at an expense of approximately $1,250,000, immediately upon the completion of which the government mak revoke the agreement, appropriate the benefits of the vast expenditure of money by the county, and resume its exclusive operation and control of the bridges. Under the uniform authorities such an agreement is held to be void for lack of mutuality of obligations and for lack of consideration.

". . .

"The document, by the terms of which the government authorizies the operation and use of the bridges by the County of Alameda, appears to be a mere conditional license or privilege to use the bridges for the convenience of public traffic, which is revocable at the pleasure of the Secretary of War at any time with or without cause. . .

". . .

"The instrument in question is in the nature of a promise or agreement on the part of the government

to permit the County of Alameda to operate and use the bridges for public traffic. Since it contains an express provision that it may be revoked at will, it creates no vested interest in the County of Alameda, and therefore lacks mutuality of obligations and also lacks consideration necessary to render it binding. . .

". . .

"There is not the slightest intimation in the license which is involved in this proceeding that the government reserves the right to revoke the use and operation of the bridges only for 'good cause'. A careful reading of the document leaves no doubt it was the intention of the government, clearly expressed in unequivocal language, that it reserves the absolute right to revoke the license at will with or without cause. It contains no limitation whatever upon that arbitrary power. It is therefore void for lack of mutuality and for lack of consideration." [3]

It would be idle to further multiply citations for the well recognized rule of law that an unconditional right of cancellation of an alleged contract destroys mutuality and renders the contract void.

By this action the United States is seeking to compel the County of Alameda to continue to operate, maintain, repair and, if necessary rebuild the Fruitvale Avenue Bridge. If the United States can revoke the license at will, and it must be conceded that it can, since the right of revocation is expressly reserved in the license itself, then the County of Alameda can likewise terminate the arrangement for the continued operation and maintenance of the bridge at any time upon reasonable notice. The County of Alameda having notified the United States on the 28th of September, 1939 that at midnight on the 31st day of December, 1939 it would cease to operate the said Fruitvale Avenue

3. Accord: *Naify* v. *Pacific Indemnity Company*, 11 Cal. (2d) 5, 11, 76 P. (2d) 663, 667; *Hamlin* v. *Barnhart*, 26 Cal. App. 632, 633, 147 Pac. 1188, 1189; *Chas. Brown & Sons* v. *White Lunch Co.*, 92 Cal. App. 457, 461, 268 Pac. 490, 491; *Shortell* v. *Evans-Ferguson Corp.*, 98 Cal. App. 650, 659, 277 Pac. 519, 523.

Bridge, was entitled to withdraw from any further participation in said operation on the date specified.

It is respectfully submitted that in view of the foregoing facts and the law applicable thereto, that the District Court should not only have refused to grant the Government's prayer for specific performance but should have decreed that there is not now, and never has been any valid or enforceable contract or agreement whereby the County of Alameda was bound to operate, maintain, repair and if necessary rebuild said Fruitvale Avenue Bridge.

VIII.

THE CONCLUSION OF LAW CONTAINED IN PARAGRAPH IX OF "CONCLUSIONS OF LAW" THAT "THE CONTRACT BETWEEN THE UNITED STATES AND THE COUNTY OF ALAMEDA IS NOT VOID FOR UNCERTAINTY" IS ERRONEOUS AND THE COURT SHOULD HAVE CONCLUDED AS A MATTER OF LAW THAT THE ALLEGED CONTRACT WAS VOID FOR UNCERTAINTY AND SHOULD HAVE REFUSED SPECIFIC PERFORMANCE OF THE SAME (APPENDIX xxxiv).

It must be remembered that the District Court by its decree of October 21, 1940 granted the Government's prayer for specific performance of the alleged contract and ordered, adjudged and decreed "that the defendant County of Alameda maintain, repair and operate Fruitvale Avenue Bridge at its sole cost and expense" and "that the County of Alameda rebuild said bridge at its sole cost and expense if the same should be burned, destroyed or become inadequate for the purpose it serves".

The appellant submits that the alleged contract is void for uncertainty, first because it provides that the license to control the bridges is revocable at the will of the Government, secondly because it contains no specification of time during which the county shall be bound to operate, maintain, repair and rebuild the bridges, and thirdly be-

cause the intent of the parties cannot be ascertained from the language of the documents constituting the alleged agreement and the court of equity should have refused to decree its specific performance.

The provision in the license from the Secretary of War to the effect that it is revocable all will is alone sufficient to render the contract void for lack of certainty. While it may be assumed that the Government would only revoke the license for good cause, there is no guagantee of such protection. For this reason the consideration, if any, is rendered valueless.

The most important element, that is, the time for which the consideration will continue, is left absolutely undetermined. From the earliest times the courts have held that where the duration of any contract is entirely within the will, whim or caprice of the promisor, such contract was vid for uncertainty.

In 1 Williston on *Contracts* (Rev. ed. 1936) 123, in discussing contracts which are void because the length of time for which either party is bound is subject to the will of the party, Mr. Williston states:

> "One of the commonest kind of promises too indefinite for legal enforcement is where the promisor retains an unlimited right to decide later the nature or extent of his performance. . ."

Section 1598 of the Civil Code of California provides:

> "Where a contract has but a single object, and such object is . . . so vaguely expressed as to be wholly unascertainable, the entire contract is void."

The object of the agreement was undoubtedly to secure to the county the control of the bridges but the length of time for which such control was given is wholly unascertainable from the terms of the contract.

In the case of *Corthell* v. *Summit Thread Co.,* 132 Me. 94, 99, 167 Atl. 79, 81, the plaintiff sued on a contract for

specific performance and for money damages. In declaring the contract void the court said:

> "There is no more settled rule of law applicable to actions based on contracts than that an agreement, in order to be binding, must be sufficiently definite to enable the court to determine its exact meaning and fix exactly the legal liability of the parties. Indefiniteness may relate to the time of performance, the price to be paid, work to be done, property to be transferred, or other miscellaneous stipulations of the agreement . . . And a reservation to either party of an unlimited right to determine the nature and extent of his performance renders his obligation too indefinite for legal enforcement, making it, as it is termed, merely illusory. . . See extended note, 53 L.R.A. 288, et seq.; . . ."

In *Chiapparelli* v. *Baker,* 252 N.Y. 192, 200, 169 N.E. 274, 277, the court said:

> "Where a promisor retains an unlimited right to decide later the nature or extent of his performance, the promise is too indefinite for legal enforcement. The unlimited choice in effect destroys the promise and makes it merely illusory. . ."

Even assuming, for the sake of argument only, that the contract was not void for lack of mutuality and that the license was not the consideration for the execution of the agreement, the contract is still void for uncertainty because it is impossible from the language of the documents which constitute the contract, if any, to ascertain whether the county agreed to operate and maintain the bridge for all time to come, whether the period for which it bound itself was for more or less than twenty-seven years, or until it had expended more or less than thirty-four times the cost of the electrification of said bridges. The agreement now before this court is of the type which equity has consistently refused to order specifically performed.

The Supreme Court of California in the case of *Pascoe* v. *Morrison,* 219 Cal. 54, 58, 25 P. (2d) 9, 11, stated:

". . . It is settled that ' "a greater amount or degree of certainty is required in the terms of an agreement which is to be specifically executed in equity than is necessary in a contract which is the basis of an action at law for damages. An action at law is founded upon a mere nonperformance by a defendant, and this negative conclusion can often be established without determining all the terms of the agreement with exactness. The suit in equity is wholly an affirmative proceeding. The mere fact of nonperformance is not enough; its object is to procure a performance by the defendant, and this demands a clear, definite, and precise understanding of all the terms; they must be exactly ascertained before the nonperformance can be enforced." ' . . ." [1]

On the basis of the authorities hereinabove cited and those contained in the section discussing lack of mutuality (App. Br. 85-95) the appellant submits that the alleged contract in the instant case is void for uncertainty because of the indefinitness of the time for which the license was granted or for which the county was bound, and that the court committed error in ordering its specific performance.

There are other respects in which the alleged contract was so uncertain as to render it unenforceable in a court of equity.

In the Rivers and Harbors Act, approved June 25, 1910 (Tr. 8-9) it was provided that the three bridges heretofore built by the United States in connection with the improvement may be "turned over" to the local authorities, to be maintained and operated by them upon such terms as to transfer and control as in the discretion of the Secretary of War may be equitable and just to the United States and to said local authorities. What is meant by the term "turned over"? The term has no recognized legal meaning and is too ambiguous and uncertain to be specifically enforced by a court of equity.

1. Accord: *Schimmel* v. *Martin*, 190 Cal. 429, 432, 213 Pac. 33, 34.

In *Scott* v. *Cline Electric Mfg. Co.,* 104 Cal. App. 122, 127, 285 Pac. 349, the promisor promised to "push the sale" of motors and the court held that the term "push the sale" was too uncertain and indefinite to constitute an enforceable consideration and there being no other promise or consideration on the part of the plaintiff, that the contract was void for uncertainty.

In *Blake* v. *Mosher,* 11 Cal. App. (2d) 532, 534, 54 P. (2d) 492, 494, the court held void for uncertainty a contract for the sale of a store, because the parties failed to agree as to the time of payment and because of the uncertainty as to what was meant by stating that the note should be "well secured".

In *Hart* v. *Georgia R. Co.,* 52 S. C. 36, 28 S.E. 637, a contract provided that if the plaintiff would erect on a certain lot a permanent, first-class hotel for the accommodation of the travelling public, maintain the same in a first-class manner and accommodate employees of the company at one-half the rate charged for customers, the company by the patronage of its road would maintain and support the hotel. The court in declaring the contract void for uncertainty asked the questions: "What is a first-class hotel? How is a hotel maintained in a first-class manner? What is the patronage of a road running trains day and night at a given point?" and concluded that it was impossible to determine with certainty what the contract between the parties was and therefore it was impossible to determine what would be the damages arising from a failure to carry out the alleged contract.

So in the instant case, what is meant by the words "turned over to the local authorities?" What are the terms under which the control is granted? Are not "terms which in the discretion of the Secretary of War may be equitable and just to the United States and to the local authorities" too indefinite for any court to specifically enforce? Is not

a control, revocable at will and subject to such conditions as the grantor in its discretion sees fit to impose, equivalent to no control at all?

Assuming that the term "turned over" means that the bridges henceforth should be under the authority and control of Alameda County, we immediately see that such control is not absolute, for it is specifically provided that the local authorities may only maintain and operate said bridges "upon such terms as in the discretion of the Secretary of War may be equitable and just to the United States and to the local authorities" (Tr. 170). The second condition of the revocable license provided, "the said three bridges shall be under the supervision of the Engineer Officer of the United States Army" (Tr. 171). How much, if any, control over and above the rules and regulations of the Federal Government was ever vested in the local authorities and how much, if any, of such control was beyond the right of the Federal Government to withdraw at will, is impossible of ascertainment. It is entirely conceivable that the rules and regulations of the Secretary of War and of the Engineer Officer would be sufficient to take from the local authorities every vestige of control over the bridges and to leave said authorities without legal redress. It is submitted that the control feature is void because of the ambiguity of the terms and because of the impossibility of determining from the words of the documents what, if any, degree of control was intended to be placed in the local authorities.

Further ambiguity appears in the resolution of 1909 wherein it is provided "that the United States should, *under such terms and conditions as it might see fit,* lease the waterfront of the Tidal Canal and establish harbor lines so as to permit the construction of wharves and docks" (Tr. 168) (emphasis added). What could be more indefinite or illusory than a provision that the promisor shall

do a certain thing "under such terms and conditions as he sees fit"? Could any provision be more capricious or more open to the whim or fancy of the promisor than a promise to do a certain thing under such terms and conditions as the promisor sees fit?

What actually happened shows how illusory this promise in fact was. Neither the 1909 nor the 1913 resolution of the board of supervisors made any reference to the harbor lines or the leases being revocable. The provision set forth on the Title Sheet to the harbor lines (Tr. 379) provided the permission to occupy the land between the pierhead and bulkhead lines was revocable at any time when the area might be again required for purposes of navigation. The right to lease the land was actually revoked about 1929 (Tr. 446). If the establishment of harbor lines and opening the land to lease was the consideration for which the County of Alameda undertook to operate the bridges for all time to come, then the Government "saw fit" to revoke the privilege after a period of some seventeen years.

It is submitted that the terms of the purported agreement are so vague and uncertain as to render the contract void and to compel the court to refuse specific performance.

IX.

THE CONCLUSION OF LAW CONTAINED IN PARAGRAPH X OF "CONCLUSIONS OF LAW" THAT "THE COURTS OF THE STATE OF CALIFORNIA HAD NO JURISDICTION TO DETERMINE SUBSTANTIAL RIGHTS OF THE UNITED STATE IN COUNTY OF ALAMEDA V. ROSS, 32 CAL. APP. (2d) 135, 89 P. (2d) 460" IS ERRONEOUS AND THE COURT SHOULD HAVE CONCLUDED AS A MATTER OF LAW THAT THE DECISION OF THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA IN THE MATTER OF COUNTY OF ALAMEDA V. ROSS, SUPRA, INTERPRETING THE STATUTES, CONSTITUTIONAL PROVISIONS AND CASE LAW OF SAID STATE IN REGARD TO THE POWERS OF THE BOARD OF SUPERVISORS AND COUNTIES OF SAID STATE, WAS BINDING UPON THE UNITED STATES DISTRICT COURT IN THE PRESENT ACTION AND THAT SAID COURT WAS WITHOUT AUTHORITY TO INTERPRET SAID STATUTES, CONSTITUTIONAL PROVISIONS AND SUBSTANTIVE LAW CONTRARY THERETO (APPENDIX p. xxxiv).

The appellant has never contended, and does not now contend that the judgment of the California District Court of Appeal in the matter of *County of Alameda* v. *Ross, supra,* determined the substantial rights of the United States to have the Fruitvale Avenue Bridge operated and maintained by Alameda County. The Government was not a party to the action in the state court. However, the United States was notified by the District Attorney of Alameda County as counsel for the County of Alameda of the filing of said petition for writ of mandate in said action. Copies of all papers filed in said action by both petitioner and respondent including stipulation of facts and all briefs were sent to, and received by the United States Attorney in San Francisco during the proceedings and before the case was submitted (Tr. 142). The Government therefore had sufficient notice to intervene in said action had it seen fit to do so and to object to any of the proceedings taken therein.

In the case of *County of Alameda* v. *Ross, supra,* the board of supervisors of Alameda County sought a writ of mandate against Ross, auditor of said county, to compel him to draw his warrant in payment of the claim for materials used in repairing the railroad portion of the Fruitvale Avenue Bridge. In order to decide whether the writ should issue it was necessary for the District Court of Appeal to determine the validity of the alleged agreement between the County of Alameda and the United States Government. The state court had before it the 1910 license of the Secretary of War and the 1913 resolution of the board of supervisors of Alameda County which incorporated and set forth in full the operative portion of the 1909 resolution of said board, the identical documents which were presented to the United States District Court for interpretation in the present action.

The County of Alameda urged the same objections against the validity of the alleged agreement in the state court as it later urged in the United States District Court. The state court passed on many of the same questions of law here presented, and concluded that the alleged agreement was void for lack of consideration and mutuality, also becauce it violated section 31 of article IV of the constitution of the State of California prohibiting a gift of public funds to a private corporation and because the alleged contract was absolutely void under the provisions of section 4005 of the Political Code of the State of California due to the fact that the board of supervisors of Alameda County was without authority to enter into the same. The United States District Court should have concluded as a matter of law that it was bound by the interpretation of the constitutional provisions and statutes of the state as well as the substantive law relating to contracts as set forth in the *Ross* case.

The District Court of Appeal in the *Ross* case relied

upon the decisions of the Supreme Court of the State of California when it declared the alleged contract a violation of section 31 of article IV of the state constitution. (*County of Los Angeles* v. *Jessup,* 11 Cal. (2d) 273, 78 P. (2d) 1131; *Howell* v. *Phelan,* 138 Cal. 271, 71 Pac. 335; *Higgins* v. *San Diego Water Co.,* 118 Cal. 524, 45 Pac. 824, 50 Pac. 670.)

In declaring the alleged contract void by reason of section 4005 of the Political Code, the court quoted with approval the language of *County of Modoc* v. *Spencer,* 103 Cal. 498, 37 Pac. 483. Likewise in declaring the alleged contract void for lack of mutuality the District Court relied upon the Supreme Court decision in *Naify* v. *Pacific Indemnity Co.,* 11 Cal. (2d) 5, 76 P. (2d) 663. Therefore, the law laid down in the case of *County of Alameda* v. *Ross* is the law of the State of California as enunciated by the highest court of that state and as applied by a court of that state, namely, the District Court of Appeal, to the identical documents now before this court for consideration. It would indeed be hard to conceive of a situation where state courts had more directly and explicitly interpreted state law in regard to a matter presented to the federal court for decision.

A state court's interpretation of its own statutes, particularly those statutes defining or limiting powers of the political subdivisions of the state, has always been held binding upon the federal courts.

In *Claiborne County* v. *Brooks,* 111 U. S. 400, 410, 28 L. ed. 470, 474, the Supreme Court of the United States said:

> "It is undoubtedly a question of local policy with each state, what shall be the extent and character of the powers which its various political and municipal organizations shall possess; and the settled decisions of its highest courts on this subject will be regarded as

authoritative by the courts of the United States; . . ."

In *City of Richmond* v. *Smith,* 15 Wall. 429, 438, 21 L. ed. 200, 202, the Supreme Court said:

". . . State courts certainly have a right to expound the statutes of the State, and having done so, those statutes, with the interpretation given to them by the highest court of the State, become the rules of decision in the Federal courts." [1]

The rule stated in the foregoing cases has been amplified and extended to include the substantive and case law of a state in the case of *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64, 78, 82 L. ed. 1188, 1194, 58 Sup. Ct. 817, 822, wherein Justice Brandeis in delivering the opinion of the Court stated:

". . . Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. And whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts. . . .

". . .

"Thus the doctrine of *Swift* v. *Tyson* is, as Mr. Justice Holmes said, 'an unconstitutional assumption of powers by the courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct.' . . ."

In the recent case of *West* v. *American Telephone* &

1. Accord: *Old Colony Trust Co.* v. *Omaha,* 230 U.S. 100, 116, 57 L. ed. 1410, 1416, 33 Sup. Ct. 967, 971; *Enterprise Irrigation District* v. *Farmers Mutual Canal Co.,* 243 U.S. 157, 166, 61 L. ed. 644, 649, 37 Sup. Ct. 318, 321; *Memphis Street Railway Co.* v. *Moore,* 243 U.S. 299, 301, 61 L. ed. 733, 735, 37 Sup. Ct. 273, 274; and *Georgia Railway Co.* v. *Decatur,* 262 U.S. 432, 438, 67 L. ed. 1065, 1073, 43 Sup. Ct. 613, 615.

Telegraph Company, 85 L. ed. 146, 150, 61 Sup. Ct. 179, 183, the Supreme Court stated:

> "A state is not without law save as its highest court has declared it. There are many rules of decision commonly accepted and acted upon by the bar and inferior courts which are nevertheless laws of the state although the highest court of the state has never passed upon them. In those circumstances a federal court is not free to reject the state rule merely because it has not received the sanction of the highest state court, even though it thinks the rule is unsound in principle or that another is preferable. State law is to be applied in the federal as well as the state courts and it is the duty of the former in every case to ascertain from all the available data what the state law is and apply it rather than to prescribe a different rule, however superior it may appear from the viewpoint of 'general law' and however much it may have departed from prior decisions of the federal courts. See *Erie R. Co.* v. *Tompkins, supra* (304 U.S. 78, 82 L. ed. 1194, 58 S. Ct. 817, 114 A.L.R. 1487); *Russell* v. *Todd, supra* (309 U.S. 293, 84 L. ed. 762, 60 S. Ct. 527)." [2]

Whether this Court considers the decision in the case of *County of Alameda* v. *Ross, supra,* as a mere restatement of the statutory and substantive law of the State of California, as laid down by the Supreme Court of that state, or whether it looks upon that decision as the decision of an intermediate court and concedes that there is an "absence of convincing evidence that the highest court of the state would decide differently", it is submitted that the United States District Court was bound by the interpretation of the law set forth in that case. This is particularly true in view of the fact that the petition for writ of man-

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2. The same rule was reiterated in the following cases: *Six Companies of California* v. *Joint Highway District,* 85 L. ed. 159, 162, 61 Sup. Ct. 186, 188; *Fidelity Union Trust Company* v. *Field,* 85 L. ed. 176, 178, 61 Sup. Ct. 176, 178; and *Stoner* v. *New York Life Insurance Co.,* 85 L. ed. 275, 277, 61 Sup. Ct. 336, 338.

date in the *Ross* case was filed originally in the Supreme Court of the State of California and was transferred by said Court to the District Court of Appeal and that subsequent to the decision of the District Court a petition to have the cause heard in the Supreme Court of California was denied on the 1st day of June, 1939 (Tr. 142).

X.

THE COURT ERRED IN NOT CONCLUDING AS A MATTER OF LAW THAT EQUITY WILL NOT DECREE SPECIFIC PERFORMANCE OF AN ALLEGED CONTRACT WHICH IS OPPRESSIVE, UNJUST AND UNCONSCIONABLE (APPENDIX p. xxxvi).

Assuming, for the sake of argument only, that the alleged agreement is legally sufficient, still a court of equity will not lend its aid to specifically enforcing a contract which is oppressive, unjust and unconscionable. A decree that the taxpayers of Alameda County should be forever burdened with the obligation of operating, maintaining, repairing and if necessary rebuilding the Fruitvale Avenue Bridge, the property of the United States, for the benefit of the Government and of a private railroad company in return for the revocable privilege of controlling said bridge would be contrary to the most fundamental laws of equity and good conscience.

As we have heretofore pointed out, if the appellant's theory is correct that the control of the bridges was the object and prime consideration for the working arrangement entered into by the County of Alameda with the federal government, the so-called agreement is utterly lacking in mutuality, hence void and unenforceable either in law or equity. If we accept the Government's theory that the electrification of the bridges at a cost of approximately $21,000 was the consideration for the execution of the agreement, then the consideration is so inadequate and the contract so grossly inequitable and unjust to the County of Alameda that no court of equity should lend

its aid to order the specific performance thereof. The County of Alameda has repaid the cost of such electrification more than thirty-four times during the past twenty-seven years.

The rule that equity will be bound by principles of fairness and good conscience is so well established as to need no citation of authority. The Supreme Court of the United States from the earliest times has recognized that courts of equity are courts of conscience and that the power to order specific performance is exercised under the sound discretion of the court with an eye to the substantial justice of the case.

In the very early case of *King* v. *Hamilton,* 29 U. S. 311, 327, 7 L. ed. 869, 875, the Supreme Court of the United States said:

> ". . . When a party comes into a court of chancery, seeking equity, he is bound to do justice, and not ask the court to become the instrument of iniquity. Where a contract is hard, and destitute of all equity, the court will leave parties to their remedy at law; and if that has been lost by negligence, they must abide by it. It is a well settled rule, therefore, to allow a defendant in a bill for a specific performance of a contract to show that it is unreasonable or unconscientious, or founded in mistake, or other circumstances, leading satisfactorily to the conclusion, that granting the prayer of the bill would be inequitable and unjust. . ."

In *Pope Manufacturing Co.* v. *Cormully,* 144 U. S. 224, 236, 36 L. ed. 414, 419, 12 Sup. Ct. 632, 637, the Supreme Court of the United States said:

> "But whether this contract be absolutely void as contravening public policy or not, we are clearly of the opinion that it does not belong to that class of contracts, the specific performance of which a court of equity can

> be called upon to enforce. To stay the arm of a court of equity from enforcing a contract it is by no means necessary to prove that it is invalid; from time to time immemorial it has been the recognized duty of such courts to exercise a discretion; to refuse their aid in the enforcement of unconscionable, oppressive or iniquitous contracts; and to turn the party claiming the benefit of such contract over to a court of law. This distinction was recognized by this court in *Cathcart* v. *Robinson,* 5 Pet. 264, 276, wherein Chief Justice Marshall says: 'The difference between that degree of unfairness which will induce a court of equity to interfere actively by setting aside a contract, and that which will induce a court to withhold its aid, is well settled. 10 Ves. 292; 2 Coxe's Cases in Chancery, 77. It is said that the plaintiff must come into court with clean hands, and that a defendant may resist a bill for specific performance, by showing that under the circumstances the plaintiff is not entitled to the relief he asks. Omission or mistake in the agreement, or that it is unconscientious or unreasonable. . . are enumerated among the causes which will induce the court to refuse its aid.' . . ."

In the instant case there is no claim made that the United States Government secured the alleged promise of the County of Alameda to operate, maintain, repair and, if necessary, rebuild the Fruitvale Avenue Bridge by sharp or unscrupulous practices or by overreaching or by concealment of important facts. However ,it is claimed that the contract itself is "unfair, one-sided, unconscionable" and affected by such inequitable features that specific performance would be oppressive upon, and would work a definite injustice to the County of Alameda.[1]

The case and statutory law of the State of California is

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1. *Willard* v. *Tayloe,* 8 Wall. 557, 567, 19 L. ed. 501, 504; *Woollums* v. *Horsley,* 93 Ky. 582, 585, 20 S.W. 781; and *Pugh* v. *Phelps,* 37 N.M. 126, 131, 19 P. (2d) 315, 318.

in harmony with the rules expressed in the above quotation. Section 3386 of the Civil Code of the State of California provides:

> "Neither party to an obligation can be compelled specifically to perform it, unless the other party thereto has performed, or is compellable specifically to perform, everything to which the former is entitled under the same obligation, either completely or nearly so, together with full compensation for any want of entire performance."

Section 3391 of the same code reads as follows:

> "Specific performance cannot be enforced against a party to a contract in any of the following cases:
>
> "1. If he has not received an adequate consideration for the contract;
>
> "2. If it is not, as to him, just and reasonable; . . ."

In the instant case reason and common sense would demand that the 1909 and 1913 resolutions of the board of supervisors and the 1910 revocable license of the United States Government be so construed as to negative any intent on the part of the county to have forever bound itself to operate and maintain the Fruitvale Avenue Bridge.

An additional reason why this court should not order specific performance of the alleged agreement is that said agreement was utterly lacking in consideration, for the reason that in electrifying the bridges the United States Government was only doing what it was legally bound to do under the terms of the *Crooks* decree. Insofar as pertinent, said decree reads as follows (Tr. 131):

> "Defendants, the County of Alameda, . . . not having claimed damages, no damages are awarded to them.
>
> "It is further ordered, adjudged and decreed that in the construction of said canal the plaintiff at its own expense construct and keep in repair *suitable* bridges across the same on all the roads now used as public highways crossing the line of said canal and also

suitable railroad bridges on the present railroad tracks crossing the line of said canal." (Emphasis added.)

The meaning of the word "suitable" is all important in determining the liability of the federal government under the above quoted judgment. Webster defines "suitable" as follows:

"That is suited to one, one's needs, wishes, or condition, the proprieties, etc., appropriate; fitting;"

In 60 Corpus Juris, page 1003, it is said:

"SUITABLE. The word is an elastic, and varying term, dependent upon the necessities of changing times or conditions. It has been defined as meaning adapted; appropriate; capable of suiting; compatible with safety; convenient; fit and appropriate for the end to which it is to be devoted; fitting; likely to suit; reasonable; safe or not defective. The word has been construed as being substantially equivalent to 'fit', 'good', and 'sufficient'; and distinguished from 'adequate,' and 'used.' "[2]

The question therefore arises: what type of bridge was suitable, adequate and sufficient to take care of the needs of highway, railroad and channel traffic in 1913 and in the years thereafter?

Prior to 1913 the bridges operated over the Oakland Estuary were equipped for manual operation taking approximately thirty minutes to open and the same time to close (Tr. 132). The Tidal Canal was intended to be, and actually was a navigable body of water. According to the Agreed Statement of Facts boats, barges and scows plied up and down said Canal (Tr. 132). The population of Oakland had increased almost five times in the years intervening between the date of the construction of the Fruitvale Avenue Bridge and the 17th day of November, 1913. It must be conceded that a bridge suitable to handle the

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2. For further definitions of the word "suitable" see: *United States* v. *American and Patterson*, 9 Ct. Cust. App. 244, 245; *Sawyer* v. *Gilmore*, 109 Me. 169, 184, 83 Atl. 673, 680; and *Mumme* v. *Marrs*, 120 Tex. 383, 396, 40 S.W. (2d) 31, 36.

traffic of two sparsely settled communities in 1901 had necessarily become inadequate and nonsuitable in 1913, when the two communities had greatly increased in population and grown industrially and when the channel, highway, pedestrian and railroad traffic had likewise greatly increased in volume.

One of the conditions under which the license to control the bridges was granted to Alameda County was:

> "3.——That the United States shall put all three bridges in condition for operation of their draws by electrical power, furnishing and installing new electrical machinery together with the necessary cables and wiring; furnishing bridge-tenders' houses and highway gates; and also overhauling all old machinery and putting it in good order for operation under the new conditions." (Tr. 171-172).

However, it may be seen that by the doing of the things set forth in the foregoing paragraph, the federal government was only maintaining bridges "suitable" for public highways and railroad bridges, as it was previously bound to do by the judgment in the *Crooks* case.

The Court may take judicial notice of the fact that most drawbridges spanning bodies of water over which a continuous stream of highway and railroad traffic passes, have been electrified and modernized within the last thirty years. The duty on the part of the federal government to construct and keep in repair "suitable" bridges across the canal would necessarily have involved the electrification and modernization of the bridges. Therefore the federal government by its promise to the county to electrify and modernize the bridges, suffered no detriment in addition to that which it was previously bound to suffer, nor did the County of Alameda receive any benefit to which it was not already entitled.

To promise to do that which one is already bound to do is not a valid consideration for a new promise. This rule

of law is set forth in 13 Corpus Juris, section 207, page 351, as follows:

> "A promise to do what the promisor is already bound to do cannot be a consideration, for if a person gets nothing in return for his promise but that to which he is already legally entitled, the consideration is unreal. . . ."

Section 209, page 353, continues as follows:

> "The promise of a person to carry out a subsisting contract with the promisee or the performance of such contractual duty is clearly no consideration, as he is doing no more than he was already obliged to do, and hence has sustained no detriment, nor has the other party to the contract obtained any benefit. Thus a promise to pay additional compensation for the performance by the promisee of a contract which the promisee is already under obligation to the promisor to perform is without consideration. . ."

Innumerable cases from the federal courts as well as from courts of California [3] and other state jurisdictions might be cited in support of this universally recognized rule of law. However, the following quotation from the case of *In re Riff* (D.C.E.D. Ark. 1913) 205 Fed. 406, 409, sufficiently states the rule in the following language:

> "It is also a well-recognized principle of law that when a party merely does that which by law he is obligated to do he cannot demand any additional consideration therefor, even if he obtained a promise, as the law will regard it as *nudum pactum* and will not lend its process to aid in the wrong."

It is submitted that the United States Government by electrifying and modernizing the Fruitvale Avenue Bridge was merely constructing and maintaining "suitable" bridges as it was legally bound to do by the judgment in the *Crooks*

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3. That the foregoing rule is well recognized by the courts of California is stated in the case of *Pacific Finance Corporation* v. *First National Bank*, 4 Cal. (2d) 47, 50, 47 P. (2d) 460, 462.

case; that its subsequent promise to the county to do so was not a sufficient consideration for the promise of the county to repair, maintain and rebuild said bridge and that a court of equity should have refused the prayer of the appellee for specific performance of the alleged contract which is not only lacking in mutuality and consideration but is also oppressive, unjust and unconscionable.

XI.

THE CONCLUSION OF LAW CONTAINED IN PARAGRAPH XII OF "CONCLUSIONS OF LAW" WHICH READS "THAT THE COUNTER CLAIM OF THE DEFENDANT COUNTY OF ALAMEDA BE DISMISSED AND SAID DEFENDANT COUNTY TAKE NOTHING THEREBY" IS ERRONEOUS AND THE COURT SHOULD HAVE CONCLUDED AS A MATTER OF LAW THAT THE COUNTERCLAIM OF THE DEFENDANT COUNTY OF ALAMEDA BE ALLOWED AND THAT THE SAID COUNTY HAVE ITS COSTS EXPENDED IN THIS PROCEEDING (APPENDIX p. xxxv).

The prinicples of law hereinbefore discussed establish the fallacy of the conclusion of law that the counterclaim of the County of Alameda should be denied and that the said county take nothing in this action. For the reasons set forth in the foregoing sections of this brief the United States District Court should have found that the alleged contract between the United States and the County of Alameda was *ultra vires* and void and should have decreed that the County of Alameda was relieved of all liability in respect to the operation, maintenance, repairing and rebuilding of the Fruitvale Avenue Bridge and that said county should have its costs in this action.

XII.

ERROR IN FINDINGS OF FACT CONCERNING THE NAVIGABILITY OF THE TIDAL CANAL AND ERROR IN THE REJECTION OF THE TESTIMONY OF MAJOR G. H. MENDELL AND OF THE FACT THAT SAID MENDELL WAS DECEASED (APPENDIX pp. xxxvi, xxxvii).

The appellant shall discuss the four following assignments of error together:

First: That the fact set forth in paragraph V of the Findings of Fact which read: "The Tidal Canal was not open to navigation" (Tr. 252) is erroneous and the court should have found in lieu thereof that the Tidal Canal was navigable in fact (Appendix p. xxv).

Second: That the fact set forth in paragraph XI of the Findings of Fact which read: "On June 3, 1913, the United States opened the Tidal Canal to navigation, established harbor lines, and made available to adjacent property owners a twenty-five foot strip of property along each side of the Canal for the construction of wharves and warehouses" (Tr. 263) is erroneous and the court should have found in lieu thereof that prior to June 3, 1913 the Tidal Canal was open to navigation (Appendix p. xxvi).

Third: That the court erred in refusing to admit in evidence the testimony of the witness, Major G. H. Mendell, given in the case of *United States* v. *Crooks* (Appendix p. xxxvi).

Fourth: That the court erred in refusing to admit evidence of the fact that the said Major Mendell was deceased prior to the commencement of the proceeding now before this court and during his lifetime was the same party named as defendant in *United States* v. *Crooks* (Appendix p. xxxvii).

The Government stipulated (Tr. 131-132, 166, 391) and the district court found (Tr. 250-252) that after the condemnation proceeding in the *Crooks* case the United States constructed the Tidal Canal which for many years prior

to 1913 averaged eight to ten feet in depth and had a clearance of twelve feet eight inches below the Fruitvale Avenue Bridge and of thirteen feet three inches below the Park Street and High Street Bridges and that "boats, barges and scows . . . plied up and down said Tidal Canal." The bridges were originally equipped to be opened and closed with hand operated machinery and were so opened and closed on occasions, not only by the United States but also by private interests, to permit passage of vessels which could not clear the bridges.

The Agreed Statement of Facts contains no statement to the effect that the Tidal Canal was not open to navigation prior to June 1913, or that the United States opened it to navigation on that date, nor is either fact a logical inference from anything contained therein. In the testimony of Captain Pond there was no mention of the navigability of the Tidal Canal nor of the opening of the canal to navigation (Tr. 373-460). Any allegation concerning these matters contained in the Government's complaint was negatived by the stipulation of the parties that the Agreed Statement of Facts completely superseded the pleadings (Tr. 126). Therefore there is a total absence of any evidence to support either of these findings of fact.

It is submitted that the foregoing stipulated and determined facts made the Tidal Canal navigable and open to navigation both in law and in fact for many years prior to 1913.

Additional evidence to support this conclusion is the endorsement of June 3, 1913 on exhibit 9 of the United States (Tr. 379) concerning occupancy of the government strip of land along the Tidal Canal which read in part as follows:

> " . . . this permission is revocable at any time when the area may be *again* required for purposes of navigation . . ." (Tr. 495) (Emphasis added).

The use of the word "again" clearly indicates that said canal had been used for purposes of navigation prior to this endorsement of June 3, 1913.

Even assuming that the Government did open the canal to navigation in June 1913, there was evidence adduced that it did so gratuitously as part of a plan to develop San Francisco Bay area (Tr. 414, 417-418, 441) and without any agreement that it was so doing in consideration for any promise of any kind by the County of Alameda to operate or maintain the bridges. Furthermore the Government was bound by the judgment in the *Crooks* case to operate the Tidal Canal as a navigable waterway, as appellant would have shown by the testimony of G. H. Mendell, Major of Engineers, in that case, had it been permitted to do so.

Over the objection of appellant that the report regarding proposed plan for improving Oakland Harbor, 1874 (Tr. 350), was irrelevant and immaterial and should not be admitted unless the testimony of Mendell in the *Crooks* case was likewise admitted (Tr. 335, 337-339), the district court admitted in evidence said report prepared by the said G. H. Mendell, which was offered by the Government for the purpose of showing the purposes for which the Tidal Canal was constructed (Tr. 335, 345).

The district court erred in rejecting the testimony of G. H. Mendell in the *Crooks* case of which his report of 1874 was a part (Tr. 180-196, 202-203) and which did not vary nor contradict said report but which clarified and explained certain things as to which the report was either silent or ambiguous and which was admissible for the following reasons:

1. If the report of 1874 was admissible to show the purposes for which the canal was constructed, then in order to amplify and explain that report and to furnish the court with a more comprehensive picture of the extent and

purpose of said canal, the testimony of the maker of that report given in connection therewith in the condemnation action by which the Government acquired the Canal, should likewise have been admitted. There is no doubt that if Mendell had been alive he could have been called as a witness and could have explained and clarified the material contained in his report. The fact that Mendell was dead (Tr. 198) did not affect the materiality of his testimony and no objection was made to its competency.

2. The testimony was admissible to explain the ambiguity of the decree in the *Crooks* case which was admitted in evidence and which concluded as follows (Tr. 161-165):

> "It is further ordered, adjudged and decreed that in the construction of said canal the plaintiff at its own expense construct and keep in repair *suitable* bridges across the same on all roads now used as public highways, crossing the line of said canal and also *suitable* railroad bridges on the present railroad tracks crossing the line of said canal." (Tr. 165). (Emphasis added.)

For the purpose of establishing the fact that the Tidal Canal was intended to be a navigable waterway and defining the meaning of "suitable" bridges, the testimony of Major Mendell should have been admitted. Had this been done, the district court would not have found that the Tidal Canal was not navigable or was not open to navigation prior to June 1913, for Major Mendell testified as follows:

> "Q. Do you propose it (Tidal Canal) for navigable purposes?
>
> "A. Yes sir. . . (Tr. 193).
>
> "Q. Do you think that the land through which this canal is to be constructed would be benefited by the canal?
>
> "A. I don't see why it wouldn't be; that is the adjoining parts of it. . . (Tr. 193, 194).
>
> "Q. You expect Colonel Mendell to make this a navigable canal. Do you intend to make the bridges across the canal draw bridges?

"A. I suppose so. It would not be navigable without it sir." (Tr. 195).

If at the time the decree was rendered it was contemplated that the canal would be constructed for navigation, then the Government was bound to construct and maintain a navigable waterway under said decree and was also obligated thereunder to equip the Fruitvale Avenue Bridge for electrical operation in 1913, when due to increased traffic and modern improvements a hand-operated bridge was no longer a "suitable" bridge because of the length of time required to open and close the same (Tr. 132).

Hence the keeping of the Tidal Canal open for navigation and equipping the Fruitvale Avenue Bridge for electrical operation in 1913 furnished no consideration whatever for the County of Alameda to execute the alleged license agreement since the United States was only doing that which it was legally bound to do under the provisions of said decree in the *Crooks* case.

3. The testimony was also admissible to explain and amplify that portion of the decree in the *Crooks* case which reads as follows:

"Defendants the County of Alameda, . . . not having claimed damages, no damages are awarded to them." (Tr. 164-165).

The appellant was entitled to show that the reason that the County of Alameda claimed no damages by reason of said condemnation action was because the county expected to derive a benefit from the fact that the Tidal Canal was open to navigation. The property having been condemned for that purpose and the county having for that reason waived monetary damages, the Government was obligated to continue to keep the canal open to navigation.

The testimony of Major Mendell in the *Crooks* case was material to these issues. This is a court of equity and is bound by equitable principles. It is a fundamental equit-

able principle that equity regards that as done which ought to have been done. [1] "To do or by doing what the law or previous agreement requires, merits nothing and it is not a consideration for anything." [2]

XIII.

FURTHER ASSIGNMENTS OF ERROR IN FINDINGS OF FACT.

The court erred in refusing to find the following facts urged by the appellant County of Alameda in its proposed Amendments and Additions to Findings of Fact and Conclusions of Law (Tr. 230-240) for the following reasons:

1. The court should have found that the harbor lines were revocable at will by the Secretary of War and were in fact revoked by him in 1929 (Tr. 238). Captain Pond testified that the pierhead lines were moved back to the bulkhead lines some time around 1929 (Tr. 446).

2. The court should have found that the permission given to adjacent property owners to occupy the strip of land along the canal for the construction of wharves and warehouses was without special lease of any kind and was expressly revocable by the Government (Tr. 238). The endorsement on the Title Sheet of Maps of San Francisco Bay of 1912 definitely stated that the permission to occupy the strip of property between the pierhead and bulkhead lines was revocable at any time when this area might again be required for purposes of navigation (Tr. 379).

3. The court should have found that in *County of Alameda* v. *Ross,* 32 Cal. App. (2d) 135, 89 P. (2d) 460, the District Court of Appeal of California had before it the resolution of the board of supervisors of the County of Alameda of November 10, 1913 which incorporated the

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1. California Civil Code § 3529.
2. Bishop, *Contracts,* § 48; and *Pacific Finance Corp.* v. *First National Bank of Puente,* 4 Cal. (2d) 47, 50, 47 P. (2d) 460, 462.

resolution of said board of December 6, 1909 (Tr. 239). The opening paragraph of the resolution of the board of supervisors of November 10, 1913 (Appendix p. xliv) embodied the entire operative section of the resolution of the board of supervisors of December 6, 1909 (Appendix p. xl).

4. The court should have found that the United States was notified by the District Attorney of the County of Alameda as counsel for the County of Alameda of the filing of the "Petition for Writ of Mandate" in *County of Alameda* v. *Ross, supra,* and that copies of all papers filed in said action by both petitioner and respondent, including the stipulation of facts and all briefs, were sent to and received by the United States Attorney in San Francisco during the proceeding and before the case was submitted (Tr. 239-240). In the Agreed Statement of Facts the parties stipulated to the foregoing facts (Tr. 142) which are important because this is an equitable proceeding and it is incumbent upon the appellant to show that it is now, and always has been acting in good faith towards the United States Government.

CONCLUSION

For the foregoing reasons it is submitted that the Southern Division of the United States District Court for the Northern District of California erred in concluding as a matter of law that the County of Alameda and the United States of America entered into a valid, binding contract and that under said contract the County of Alameda was obligated to operate, maintain, repair and rebuild the Fruitvale Avenue Bridge and in directing that judgment be entered in accordance with its Findings of Fact and Conclusions of Law.

Accordingly, Appellant County of Alameda prays for a reversal of this erroneous and inequitable decree and that its counterclaim and costs be allowed.

Dated: May 1, 1941.

Respectfully submitted,

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J. F. COAKLEY,
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Attorneys for Appellant County of Alameda.

APPENDIX

APPENDIX

APPENDIX

I.

IN THE SOUTHERN DIVISION
OF THE
UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, *Plaintiff,* vs. COUNTY OF ALAMEDA (a Body Corporate and Politic, and a Political Subdivision of the State of California), CENTRAL PACIFIC RAILWAY COMPANY, and SOUTHERN PACIFIC COMPANY, *Defendants.*	No. 21467-L.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled cause heretofore came on duly and regularly for trial and hearing before this Court, sitting without a jury; Messrs. Frank J. Hennessy, United States Attorney, William E. Licking, Assistant United States Attorney, and Brice Toole, Attorney, Department of Justice, appearing for the plaintiff, and Messrs. Ralph E. Hoyt, District Attorney, J. F. Coakley, Chief Assistant District Attorney, Robert H. McCreary, Assistant District Atorney, and Cecil Mosbacher, Deputy District Attorney, appearing for the defendant County of Alameda, and Mr. E. J. Foulds, appearing for the defendants Central Pacific Railway Company, and Southern Pacific Company; both oral and documentary evidence having been introduced at

the trial thereof, on behalf of the respective parties hereto, and the evidence being closed, and the cause submitted to this Court for its decision and determination, and the Court being duly advised in the premises, finds the following facts:

FINDINGS OF FACTS

I.

The plaintiff is the United States. The County of Alameda was at all times herein mentioned, and now is a body corporate and politic, and a political subdivision of the State of California. The Central Pacific Railway Company, and the Southern Pacific Company are private corporations, duly authorized and licensed to do business within the State of California, and are engaged in the business of operating railroad lines within and without said State, and are the owners of, or claim some interest in, certain railway rights of way within the said County of Alameda in or over the Tidal Canal described hereafter, and more particularly in, over and upon the Fruitvale Avenue Bridge hereinafter mentioned.

II.

The City of Alameda and the City of Oakland are both situated upon the east shore of San Francisco Bay, a navigable body of water. Both said cities are located within Alameda County, State of California, and are separated from each other by a navigable body of water known at various times and in various quarters by the following names: San Antonio Estuary, Oakland Estuary, Oakland Harbor, Inner Harbor and Tidal Canal and Alameda Estuary. Said body of water is roughly seven miles in length, extending in a general east and west direction from San Leandro Bay, an arm of San Francisco Bay, on the east, to another point in San Francisco Bay proper at the end of the

moles of the Southern Pacific Railroad Company and the Western Pacific Railroad Company on the west. Said Estuary constitutes what is commonly known as Oakland's inner harbor; the outer harbor extending in a northeasterly direction for about two miles from the entrance to the inner harbor. The westerly end of the Estuary, for a distance of about two miles, is an entrance channel, protected by stone retaining walls on either side. Said entrance channel varies from Seven Hundred and Fifty to Eight Hundred and Fifty feet in width. Immediately east of said entrance channel lies the main portion of the inner harbor, with docking facilities; the width of the channel here being Six Hundred feet, and the natural harbor varying from Six Hundred and Fifty feet at the narrowest points to about Three Thousand Five Hundred feet at the easterly end where the harbor widens to form what is known as Brooklyn Basin.

Easterly of Brooklyn Basin and forming a continuous part of the same body of water is the "Tidal Canal" nearly two miles in length connecting the inner harbor with San Leandro Bay. Said Tidal Canal was originally dredged by the United States to turn the water from San Leandro Bay or estuary through a tidal canal into the head of San Antonio estuary, so as to increase the tidal flow into and through said San Antonio estuary, for the purpose of removing the sediment from the same, AND AFFORDING A DEEPER ENTRANCE TO SAID SAN LEANDRO BAY THROUGH SAN ANTONIO ESTUARY AND THE CANAL, ALL IN THE INTEREST OF COMMERCE AND NAVIGATION ON THE EAST SIDE OF SAN FRANCISCO BAY.

III.

In the year 1874 Congress enacted the Rivers and Harbors Act for that year, in which the sum of $100,000 was

appropriated "for the improvement of Oakland Harbor;" (18 Stat. 237, c. 457) to be expended under the direction of the Secretary of War.

In 1876 the United States instituted a condemnation proceeding in the District Court of the Third Judicial District in and for the State of California (now the Superior Court of the State of California, in and for the County of Alameda) to acquire a right of way for the said Tidal Canal, said action being entitled The United States, plaintiff, v. Crooks, County of Alameda, Central Pacific Railroad Company, et al, defendants, action No. 3590 in the records of the County Clerk of the County of Alameda for the District Court of the Third Judicial District, the State of California, in and for the County of Alameda.

IV.

In said suit the County of Alameda and the Central Pacific Railroad Company were named, among others, as defendants and the United States sought to condemn the rights of the County and of the railroad in certain higways and railroad rights of way which crossed the proposed Tidal Canal at the places where the Fruitvale Avenue, High and Park Street bridges are now located, and at Washington Avenue, where a railroad right of way was then located. The right of way and tracks of the Central Pacific Railroad Company, which crossed the proposed Tidal Canal at Fruitvale Avenue, paralleled and adjoined the right of way of the county road belonging to the defendant, County of Alameda, which also crossed the proposed Tidal Canal at Fruitvale Avenue.

The County of Alameda and the railroad company asked for no damages in said condemnation proceedings, and in the decree in said action hereinabove referred to, it was provided, among other things

"Defendants, the County of Alameda, The Central

Pacific Railroad Company, Charles Heinecke and S. A. Smith, not having claimed damages, no damages are awarded to them.

"It is further ordered, adjudged and decreed that in the construction of said canal the plaintiff at its own expense construct and keep in repair suitable bridges across the same on all the roads now used as public highways crossing the line of said canal and also suitable railroad bridges on the present railroad tracks crossing the lines of said canal."

V.

After said decree of condemnation, the United States constructed said Tidal Canal TO A DEPTH AVERAGING IN SOUNDINGS FROM 8 TO 10 FEET, SAID SOUNDINGS REFERRING TO THE PLANE OF MEAN LOWER LOW WATER,—as per "Exhibit 2" page 91 of the "Agreed Statement of Facts" on file herein, and constructed, and until November 17, 1913, maintained and operated highway drawbridges at Park Street and High Street, and a combination railroad, vehicular and pedestrian drawbridge at Fruitvale Avenue, THE LATTER WITH A CLEARANCE BELOW SUCH BRIDGE OF 12 FEET 8 INCHES ABOVE MEAN LOWER LOW WATER—as per "Exhibit 2" page 91 of the "Agreed Statement of Facts" on file herein. The Park Street Bridge was completed in 1891; the High Street and Fruitvale Avenue Bridges were completed in 1901 and said construction of said Tidal Canal was completed in 1903.

The bridges were constructed as drawbridges of the swing type, turning or pivoting horizontally upon central piers, and were equipped with hand-operated machinery. It took approximately thirty minutes to open and thirty minutes to close each of these bridges. After these bridges were equipped with electrical operating machinery, as here-

inafter set forth, it took from two to three minutes to open, and the same time to close each of said bridges.

Prior to said installation of electrical operating machinery the United States did not regularly operate said bridges, but did, on occasions, open and close them on request of private interests for the passage of vessels; private interests on occasions also opened and closed said bridges on their own responsibility for the passage of vessels which could not clear said bridges when closed; and boats, barges and scows which could clear said bridges when closed plied up and down said Tidal Canal. The Tidal Canal was not open to navigation.

VI.

Prior to the institution of said condemnation proceedings the Central Pacific Railroad Company (predecessor of defendant Central Pacific Railway Company) was the owner of two lines of railroad extending across the lands sought to be condemned. One line of said roalroad was on or adjoining Fruitvale Avenue, and the other line was on or adjoining Washington Avenue, across the site of the proposed Tidal Canal, in said Alameda County, and the said Central Pacific Railroad Company was the owner of rights of way in said two lines of railroad, and was a party defendant in said condemnation proceedings.

VII.

On March 7, 1901, an agreement in writing was entered into between the United States, Central Pacific Railway Company (said Central Pacific Railway Company having succeeded to the interest of said Central Pacific Railroad Company) and the Southern Pacific Company (lessee of Central Pacific Railway Company), under which agreement the Central Pacific Railway Company in consideration of $50,000 agreed to abandon its line of railroad on or

adjoining Washington Avenue, and to relieve the United States of any obligation to construct or maintain a drawbridge across said Tidal Canal at Wasington Avenue. The defendant railroad companies claim no right or title in the Fruitvale Avenue bridge except those rights conferred upon them, or their predecessors, by the decree in United States v. Crooks et al.

VIII.

On December 6, 1909, the Board of Supervisors of Alameda County adopted a Resolution as follows:

"RESOLUTION OF THE BOARD OF SUPERVISORS OF THE COUNTY OF ALAMEDA, STATE OF CALIFORNIA, ACCEPTING PARK STREET, FRUITVALE AVENUE AND HIGH STREET BRIDGES.

"Whereas, there exists in the County of Alameda, State of California, over and across the United States Tidal Canal, certain draw bridges commonly known as the Park Street Bridge and Fruitvale Avenue Bridge, and the High Street Bridge, all of which bridges were constructed over said canal by, and belong to, and are the property of, the United States of America; and

"Whereas, no provision has ever been made for the operation of said bridges by the United States Government; and

"Whereas, that portion of said canal between said bridges has never been open to navigation; and

"Whereas, the requirements of commerce and shipping would be materially benefited by the operation of said bridges, and the opening of said canal to navigation in such manner as to permit the passage of vessels in said canal; and

"Whereas, Lieutenant Colonel John Biddle, U. S. A., in his report upon the improvement of rivers and harbors in the First San Francisco, California Districts, has recommended that the bridges hereinbefore refer-

red to, to-wit, the High Street Bridge, Fruitvale Avenue Bridge and the Park Street Bridge be turned over to the County of Alameda, provided that the County of Alameda thereafter assume all cost of repair, operation and replacement when necessary; and

"Whereas, the Honorable Joseph R. Knowland, Congressman from the Third District of California, has succeeded in securing the recommendation of the War Department that permission be given to turn these bridges over to the County of Alameda; and,

"Whereas, the City of Alameda, acting by and through its regularly constituted authorities thereunto duly authorized, has agreed to supply electric power for the operation of said bridges hereinabove referred to for the period of five years, without cost to the said County of Alameda, now, therefore,

"Be It Resolved that the County of Alameda, by and through its Board of Supervisors thereunto duly authorized, hereby agrees to accept said bridges, to-wit: The said Park Street Bridge, Fruitvale Avenue Bridge and High Street Bridge and to assume all costs of future repair, operation and replacement of said bridges, provided that they and each of them be placed in such condition and repair by the United States of America, prior to such acceptance by the said County of Alameda, in the State of California, that said bridges, and each of them may be operated by electricity, and provided further that the United States shall, under such terms and conditions as it may see fit, lease the waterfront of the tidal canal and establish harbor lines so as to permit the construction of wharves and docks; and

"Be It Further Resolved that a copy of this resolution be sent by this Board under seal of this Board to United States Senator George C. Perkins, Congressman Joseph R. Knowland, Lieutenant Colonel John Biddle, and to the City Clerk of the City of Alameda.

"Passed and adopted by the following votes:

"Ayes: Supervisors—Bridge, Foss, Mullins and Ch. Honrner 4.

"Noes: Supervisors—None.

"Absent: Supervisors—Kelley.

I hereby certify that the foregoing is a true and correct copy of a Resolution adopted by the Board of Supervisors of Alameda, Cal., Monday, December 6th, 1909.

JOHN P. COOK,
County Clerk and Ex-officio Clerk of the Board of Supervisors of Alameda County, Cal.
By H. M. WILSON,
Deputy Clerk."

IX.

On September 3, 1910, the Secretary of War issued a license to the County of Alameda as follows:

"J. A. G. O.
(27215)

"Whereas, by the Act of Congress approved June 25, 1910 entitled 'An Act making appropriations for the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes' (Public ..... No. 264), and under the clause of appropriation therein for 'Improving harbor at Oakland, California,' it is provided, *inter alia,* as follows:

'Provided further, that the three bridges heretofore built by the United States in connection with this improvement may be turned over to the local authorities to be maintained and operated by them upon such terms as to transfer and control as in the discretion of the Secretary of War may be equitable and just to the United States and to said local authorities;

'Provided further, that of the appropriation herein made so much as shall be necessary may be expended for such alterations and repairs to said bridges as in the discretion of the Secretary of War may be essential to meet the terms of said transfer';

"Now, Therefore, under the authority and discretion in him vested by the above-quoted provision of said Act of Congress, and in accordance with the recommendation of the Chief of Engineers, United States Army, the Secretary of War hereby grants unto the BOARD OF SUPERVISORS OF ALAMEDA COUNTY, CALIFORNIA, A LICENSE, revocable at will by the Secretary of War, to assume control of the said three (3) bridges built by the United States in connection with the improvement of Oakland Harbor, California.

This LICENSE is granted subject to the following conditions and provisions:

1.—That the three bridges shall be freely open to all public traffic without charge, and that no exclusive privilege or right-of-way shall be granted to any street car or other traffic corporation, and in case two or more such lines or corporations shall desire to use the bridges, or any one of them, each shall pay its proportional share of the original cost and its share of maintenance of the track or tracks jointly used.

2.—That for the purpose of securing a compliance with the terms of this permit, the said three bridges shall be under the supervision of the Engineer Officer of the United States Army in charge of the Engineer District in which the bridges are situated.

3.—That the United States shall put all three bridges in condition for operation of their draws by electrical power, furnishing and installing new electrical machinery together with the necessary cables and wiring; furnishing bridge-tenders' houses and highway gates; and also overhauling all old machinery and putting it in good order for operation under the new conditions.

4.—That said Board of Supervisors shall maintain these bridges, attending to all necessary repairs, and rebuilding same if at any time burned, destroyed, or become inadequate for the purpose they serve.

5.—That said Board of Supervisors shall maintain the necessary number of bridge-tenders at each bridge

to insure their draws being promptly opened and closed as required in the interests of navigation and street traffic.

"Witness my hand this 3rd day of September, 1910.
(Signed) JOHN C. SCOFIELD
Assistant and Chief Clerk for the Secretary of War, in his absence."

X.

On November 10, 1913, the Board of Supervisors of Alameda County adopted a Resolution as follows:

"RESOLUTION OF THE BOARD OF SUPERVISORS OF THE COUNTY OF ALAMEDA.

Introduced by Supervisor .....

At meeting held Nov. 10, 1913.

"Whereas, This Board of Supervisors, by resolution heretofore adopted, agreed to accept certain draw bridges across the United States Tidal Canal in Alameda County, commonly known as the Park Street Bridge, Fruitvale Avenue Bridge and High Street Bridge, and assume all costs of future repair, operation and replacement of said bridges, provided that each of said bridges were placed in such condition and repair by the United States Government that said bridges, and each of them, might be operated by electricity, and that the United States should, under such terms and conditions as it might see fit, lease the water front of the Tidal Canal and establish harbor lines so as to permit the construction of wharves and docks; and

"Whereas, subsequent to the adoption of said resolution, and on the 3rd day of September, 1910, the Secretary of War, in accordance with the provisions of an Act of Congress, approved June 25, 1910, entitled 'An Act making appropriations for the construction, repair and preservation of certain public works on rivers and harbors, and for other purposes' (public No. 264), issued a license to the Board of Supervisors, revocable at will by the Secretary of War, to assume control of the

said three bridges built by the United States in connection with the improvement of Oakland Harbor, California, which said license was granted subject to the following conditions and provisions, to-wit:

1. That the three bridges shall be freely open to all public traffic without charge, and that no exclusive privilege or right-of-way shall be granted to any street car or other traffic corporation, and in case two or more such lines or corporations shall desire to use the bridges, or any of them, each shall pay its proportional share of the original cost and its share of maintenance of the track or tracks jointly used.

2. That for the purpose of securing a compliance with the terms of this permit, the said three bridges shall be under the supervision of the Engineer Officer of the United States Army in charge of the Engineer District in which the bridges are situated.

3. That the United States shall put all three bridges in condition for operation of their draws by electrical power, furnishing and installing new electrical machinery together with the necessary cables and wiring; furnishing bridge-tenders' houses and highway gates; and also overhauling all old machinery and putting it in good order for operation under the new conditions.

4. That said Board of Supervisors shall maintain these bridges, attending to all necessary repairs, and rebuilding same if at any time burned, destroyed, or become inadequate for the purpose they serve.

5. That said Board of Supervisors shall maintain the necessary number of bridge-tenders at each bridge to insure their draws being promptly opened and closed as required in the interests of navigation and street traffic; and

"Whereas, the United States has put all three bridges in condition for operation of their draws by electrical power, has furnished and installed new electrical machinery, together with the necessary cables and wiring, furnished bridge-tenders' houses and highway gates;

and, also, overhauled all old machinery and put it in good order for operation, under the new conditions as required by paragraph 3 of said License, and has performed all things required by it to be performed, under the terms of said License; now, therefore,

Be It Resolved that the Board of Supervisors of Alameda County, California, does hereby accept and assume control of the said three bridges heretofore built by the United States in connection with the improvement of Oakland Harbor, to-wit, the Park Street Bridge, the Fruitvale Avenue Bridge and the High Street Bridge, subject to the conditions and provisions of the aforesaid License of September 3, 1910, said acceptance being effective from and after Monday, November 17th, 1913.

Adopted by the following vote:

Ayes: Supervisors Bridge, Foll, Kelley, Murphy and Chairman Mullins—5.

Noes: Supervisors None.

Absent: Supervisors None.

I, John P. Cook, County Clerk, and ex-officio Clerk of the Board of Supervisors of Alameda County, State of California, do hereby certify that the foregoing resolution hereunto attached is a true and correct copy of a resolution adopted by said Board of Supervisors of Alameda County, State of California, on Monday, November 10, A. D. 1913.

JOHN P. COOK,
County Clerk and ex-officio Clerk of the Board of Supervisors of Alameda County, State of California.

By H. M. WILSON
Deputy Clerk."

XI.

On June 3, 1913, the United States opened the Tidal Canal to navigation, established harbor lines, and made

available to adjacent property owners, a twenty-five foot strip of property along each side of the Canal for the construction of wharves and warehouses.

XII.

Thereafter the said bridges were operated, repaired and maintained at the expense of said County and have been so repaired, maintained and operated except that the bridges at Park Street and High Street have been reconstructed and are now operated, repaired and maintained under other arrangements between the United States and said County which are of no significance to the present case.

XIII.

The total cost to the United States for the repair and electrification of said Fruitvale Avenue, High Street and Park Street Bridges was $21,358.80.

The annual cost paid by the County of Alameda for maintaining and operating the Fruitvale Avenue Bridge commencing during the fiscal year 1913-1914 to and including the fiscal year 1938-39 is hereinafter set forth. The annual costs paid by the County of Alameda for maintaining and operating the High Street and Park Street Bridges commencing during the fiscal year 1913-14 to the respective

fiscal year of commencement of reconstruction of the High Street and Park Street Bridges are also set forth as follows:

Fiscal Year	Fruitvale Avenue Bridge	High Street Bridge	Park Street Bridge
1913-14	$ 1,937.84	$ 1,875.47	$ 2,891.21
1914-15	11,842.51	14,146.76	9,684.14
1915-16	3,078.39	2,344.54	4,078.73
1916-17	4,072.45	3,953.74	2,840.85
1917-18	5,075.85	2,826.06	6,224.64
1918-19	6,949.80	6,652.10	10,153.72
1919-20	7,812.75	9,769.53	10,357.54
1920-21	18,465.73	6,103.83	9,167.29
1921-22	6,671.50	6,884.75	13,644.52
1922-23	7,215.71	6,796.90	13,503.47
1923-24	6,331.12	14,406.92	8,048.20
1924-25	7,558.69	9,940.27	7,466.12
1925-26	10,037.87	6,832.69	9,972.74
1926-27	8,322.69	7,485.69	7,856.16
1927-28	7,751.94	9,690.75	13,502.22
1928-29	9,888.50	10,965.56	21,003.10
1929-30	12,797.87	22,319.42	10,116.56
1930-31	29,738.53	13,150.53	12,766.64
1931-32	13,840.17	11,472.59	15,079.37
1932-33	10,130.60	9,668.81	11,888.35
1933-34	11,398.59	14,379.24	
1934-35	15,168.07	11,193.94	
1935-36	11,332.04	11,193.42	
1936-37	12,005.73	11,923.38	
1938-39	12,059.32		
Total	$262,148.19	$240,672.69	$200,245.57

The total cost paid by the County of Alameda for maintaining and operating said Bridges for the periods of time hereinabove set forth was $703,066.45.

Subsequent to the end of the fiscal year 1938-39 the average cost paid by the County of Alameda for maintaining and operating the Fruitvale Avenue Bridge has been approximately One Thousand Dollars ($1,000.00) per month, and the cost of replacing this Bridge is estimated to be approximately One Million Two Hundred Fifty Thousand Dollars ($1,250,000.00).

The total cost of maintaining, operating or replacing said Bridges since November 17, 1913, has exceeded the income

and revenues provided for the fiscal year 1913-14, or any fiscal year prior thereto, and the expenditure was not assented to by two-thirds of the qualified electors of the County of Alemada voting at an election held for that purpose.

In the fiscal year 1913-14, and in each fiscal year thereafter, the income and revenue provided by the County of Alameda for each such fiscal year was sufficient to pay for the maintenance and operation of said Fruitvale Avenue Bridge for each such one (1) fiscal year.

In the fiscal year 1913-14, and in each fiscal year thereafter, prior to the respective fiscal year of the commencement of the reconstruction of the High Street and Park Street Bridges, the income and revenue provided by the County of Alameda for each such fiscal year was also sufficient to pay for the maintenance and operation of said High Street and Park Street Bridges for each such one (1) fiscal year.

XIV.

The Fruitvale Avenue Bridge is a combination railroad, vehicular and pedestrian swing span drawbridge, built upon a single concrete center pier, and has been operated and repaired since November 17, 1913, at the expense of the County of Alameda.

The tracks and right of way of the Central Pacific Railway Company and its lessee the Southern Pacific Company are and were at all times permanent, integral and inseparable parts of the Fruitvale Avenue Bridge as constructed, and said tracks and right of way are, and since the said construction were used by the Central Pacific Railway Company and its lessee the Southern Pacific Company for the transit of both freight and interurban passenger trains over said Fruitvale Avenue Bridge. Both the Central Pacific Railway Company and the Southern Pacific Company are and were at all times private corporations. The

Central Pacific Railroad Company was at all times a private corporation.

XV.

The City of Oakland is on the mainland side of San Francisco Bay. Said City is, and prior to 1909, was, the terminal of all transcontinental railroads in central and northern California. Subsequent to the construction of the Park Street, High Street and Fruitvale Avenue Bridges, the population of the cities of Oakland and Alameda increased steadily and substantially as hereinafter set forth. Industry, shipping and commerce, both interstate and with foreign countries, as well as intrastate, increased proportionately in said cities. Traffic connected with said intrastate, interstate and foreign commerce likewise increased upon the waters described, including the waters of the Tidal Canal. Traffic upon the three bridges spanning said Tidal Canal also increased.

The Fruitvale Avenue Bridge connects residential and industrial sections of the City of Alameda with similar sections of the City of Oakland via Fruitvale Avenue, which Avenue is also a principal thoroughfare cutting through all the main traffic arteries between the Tidal Canal and the countryside. The Fruitvale Avenue Bridge carries the only rail connection both freight and interurban passenger traffic between the mainland and the City of Alameda, which is entirely surrounded by water.

The population of the County of Alameda according to the official census of the United States from 1890 to 1930, both years inclusive, is as follows:

Year	Population
1890	93,864
1900	130,197
1910	246,131
1920	344,177
1930	474,883

The respective populations of the City of Alameda and the City of Oakland, which two cities are separated by the Tidal Canal, according to the official census of the United States from 1880 to 1930, both years inclusive, is as follows:

City of Alameda

Year	Population
1880	5,708
1890	11,165
1900	16,464
1910	23,383
1920	28,806
1930	35,033

City of Oakland

Year	Population
1880	34,555
1890	48,682
1900	66,960
1910	150,174
1920	216,261
1930	284,063

XVI.

On September 28, 1939, the said County notified the United States that on December 31, 1939, it would cease to operate said Fruitvale Avenue Bridge and referred to the decision of *County of Alameda* v. *Ross,* 32 Cal. App. (2d) 135, 89 Pac. (2d) 460.

XVII.

Thereafter, on July 27, 1939, the Central Pacific Railway Company and the Southern Pacific Company served notice upon the plaintiff herein requesting that the plaintiff comply with the Decree in the case of *United States* v. *Crooks,* and others, and cause the Fruitvale Avenue Bridge to be inspected, maintained and renewed.

XVIII.

The decision of *County of Alameda* v. *Ross,* 32 Cal. App. (2d) 135, 89 Pac. (2d) 460, held the license agreement to be void. The "Petition for Writ of Mandate" before the Court in that case was filed originally in the Supreme Court of the State of California on November 25, 1938. On November 28, 1938, said Supreme Court of the State of California transferred the case to the District Court of Appeal of the Third Appellate District of the State of California for hearing and determination. The decision was duly entered on April 12, 1939. On May 19, 1939, a Petition to the Supreme Court of the State of California for hearing after said decision was filed in said Supreme Court. Said application to have the cause heard in the Supreme Court after said judgment was denied by the Supreme Court on June 1, 1939. The Court, in the said case of *County of Alameda* v. *Ross, supra,* did not have before it the resolution of the Board of Supervisors of the County of Alameda of December 6, 1909.

CONCLUSIONS OF LAW

And as conclusions of law from the foregoing facts the Court finds:—

I.

That the County of Alameda and the United States entered into a valid, binding contract, as evidenced by the Resolution adopted by the Board of Supervisors of said County on December 6, 1909; by the License issued by the Secretary of War on September 3, 1910; and the Resolution adopted by the Board of Supervisors of said County on November 10, 1913.

II.

That under said contract the said County of Alameda is obligated to maintain, operate, repair, or rebuild said Fruitvale Avenue Bridge.

III.

The County of Alameda is now estopped to set aside its contract with the United States to maintain, operate, repair or rebuild the Fruitvale Avenue Bridge.

IV.

The County of Alameda had and has authority to operate, maintain, repair or rebuild the Fruitvale Avenue Bridge.

V.

Congress had and has power to authorize the County to operate, maintain, repair or rebuild the Fruitvale Avenue Bridge.

VI.

The expenditures made by the County of Alameda to operate and maintain the Fruitvale Avenue Bridge were and are not gifts to a private corporation of public money prohibited by Section 31 of Article IV of the California Constitution.

VII.

The Contract between the County of Alameda and the United States does not violate Section 18 of Article XI of the Constitution of California forbidding a County to incur any indebtedness or liability exceeding in any year the income and revenue provided for such year.

VIII.

The contract between the United States and the County of Alameda is not void for lack of mutuality.

IX.

The contract between the United States and the County of Alameda is not void for uncertainty.

X.

The courts of the State of California had no jurisdiction to determine substantial rights of the United States in

County of Alameda vs. *Ross,* 32 Cal. App. (2d) 135, 89 Pac. (2d) 460.

XI.

That the defendants Central Pacific Railway Company, and the Southern Pacific Company were and are not parties to said contract between the said County of Alameda and the United States.

XII.

That the counter claim of the defendant County of Alameda be dismissed and said defendant County take nothing thereby.

HAROLD LOUDERBACK
United States District Judge.

[Endorsed]: Filed Oct. 10, 1940.

(Tr. 246-272).

In the Southern Division of the United States District Court for the Northern District of California.

II.

IN THE SOUTHERN DIVISION
OF THE
UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, *Plaintiff*, vs. COUNTY OF ALAMEDA (a Body Corporate and Politic, and a Political Subdivision of the State of California), CENTRAL PACIFIC RAILWAY COMPANY, and SOUTHERN PACIFIC COMPANY, *Defendants*.	No. 21467-L

DECREE

This cause came on regularly for trial before the Court sitting without a jury on the 21st and 22nd days of March, 1940; Messrs. Frank J. Hennessy, United States Attorney, William E. Licking, Assistant United States Attorney, and Brice Toole, Attorney, Department of Justice, appearing for the plaintiff, and Messrs. Ralph E. Hoyt, District Attorney, J. F. Coakley, Chief Assistant District Attorney, Robert H. McCreary, Assistant District Attorney, and Cecil Mosbacher, Deputy District Attorney, appearing for the defendant County of Alameda, and E. J. Foulds appearing for the defendants Central Pacific Railway Company and Southern Pacific Company, and the Court having heard the testimony and examined the proofs offered by the respective parties, and the Court being fully advised in the premises, and having filed herein its Findings of Fact and Conclusions of Law, and having directed that judgment be entered in accordance therewith; now, there-

fore, by reason of the law and findings aforesaid:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. That the defendant County of Alameda maintain, repair, and operate the Fruitvale Avenue bridge at its sole cost and expense;

2. That the County of Alameda rebuild said bridge at its sole cost and expense if the same should be burned, destroyed or become inadequate for the purpose it serves;

3. That the plaintiff and the defendants Central Pacific Railway Company and the Southern Pacific Company are required to pay nothing towards the maintenance, repair, operation or rebuilding of said bridge;

4. That the Court declares:

a. That the County of Alameda and the United States entered into a valid, binding contract under which the County of Alamdea became obligated to operate, maintain, repair or rebuild the Fruitvale Avenue Bridge (which bridge is more fully described in the findings of fact filed herein), and the United States is relieved of all liability in respect thereto;

b. That the County of Alameda is now estopped to deny or question the validity of the contract between said County and the United States;

c. That the defendants Central Pacific Railway Company and Southern Pacific Company were and are not parties to the contract between the County of Alameda and the United States.

5. That the counterclaim of the defendant County of Alameda be and the same is hereby dismissed, and the United States have its costs expended herein.

October 21st, 1940.

HAROLD LOUDERBACK,
United States District Judge.

[Endorsed]: Filed Oct. 21, 1940.

(Tr. 272-274).

III.

IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE
NINTH CIRCUIT

COUNTY OF ALAMEDA (a Body Corporate and Politic, and a Poltical Subdivision of the State of California), *Appellant,* vs. UNITED STATES OF AMERICA, *Appellee.*	No. 9748.

STATEMENT OF THE POINTS ON WHICH APPELLANT COUNTY OF ALAMEDA INTENDS TO RELY UPON APPEAL.

The above entitled Court having made and entered a final judgment in the above entitled action in favor of the appellee United States of America and against the appellant County of Alameda on the 21st day of October, 1940, and the appellant County of Alameda having on the 17th day of January, 1941, taken its appeal from said final judgment to the United States Circuit Court of Appeals for the Ninth Circuit, and having filed in said Court the record on appeal together with a designation of the portions of said record to be printed, the appellant does hereby serve upon the appellee United States of America and the defendants, Central Pacific Railway Company and Southern Pacific Company, and hereby files with the above entitled Court a concise statement of the following points on which it intends to rely on said appeal:

I

That the fact set forth in paragraph V of "Findings of Fact" contained in "Findings of Fact and Conclusions of Law" in the above entitled action, which said fact reads as follows: "The Tidal Canal was not open to navigation" is erroneous in that said fact is contrary to the evidence adduced at the trial and to the facts set forth in the stipulation of facts filed in said action and in that the Court should have found in lieu of said fact the following fact: "The Tidal Canal was navigable in fact".

II

That the fact set forth in paragraph VII of "Findings of Fact" contained in "Findings of Fact and Conclusions of Law" in the above entitled action, which said fact reads as follows: "The defendant railroad companies claim no right or title in the Fruitvale Avenue bridge except those rights conferred upon them, or their predecessors, by the decree in *United States* v. *Crooks, et al.*" is erroneous in that said fact is contrary to the evidence adduced at the trial and to the facts set forth in the stipulation of facts filed in said action and in that the Court should have found in lieu of said fact the following fact: "The defendant railroad companies claim a right to have the Fruitvale Avenue Bridge operated, maintained, repaired and whenever necessary, replaced by the plaintiff under the decree in *United States* v. *Crooks, et al.*"

III

That the facts set forth in "Findings of Fact" contained in "Findings of Fact and Conclusions of Law" in the above entitled action are erroneous and insufficient in that from the evidence adduced at the trial and from the facts set forth in the stipulations of facts filed in said action the Court erred in not finding the following addition fact: "In the Rivers and Harbors Act, approved June 25, 1910, 36 Stat. 630, c. 382, it is provided, *inter alia,* as follows:

'Provided further, That the three bridges heretofore built by the United States in connection with this improvement may be turned over to the local authorities to be maintained and operated by them upon such terms as to transfer and control as in the discretion of the Secretary of War may be equitable and just to the United States and to said local authorities; Provided further, That of the appropriation herein made so much as shall be necessary may be expended for such alterations and repairs to said bridges as in the discretion of the Secretary of War may be essential to meet the terms of said transfer.' "

IV

That the fact set forth in paragraph XI of "Findings of Fact" contained in "Findings of Fact and Conclusions of Law" in the above entitled action, which said fact reads as follows: "On June 3, 1913, the United States opened the Tidal Canal to navigation, established harbor lines, and made available to adjacent property owners, a twenty-five foot strip of property along each side of the Canal for the construction of wharves and warehouses" is erroneous in that said fact is contrary to the evidence adduced at the trial and to the facts set forth in the stipulations of facts filed in said action and in that the Court should have found in lieu of said fact the following fact:

"Between September 3, 1910, and November 10, 1913, the plaintiff installed electrical operating machinery on the said bridges and thereafter the bridges were operated, maintained and repaired by the County of Alameda instead of the plaintiff.

"In 1910 a harbor line survey was made for San Francisco Bay for the purpose of establishing harbor lines in said area pursuant to recommendation of the Board of Engineers of the United States Army and authorization of Congress previously made.

"In the making of said survey a survey made prior to

1876 for the purpose of the condemnation action of *United States* v. *Crooks, et al* was used in the preparation of the map of harbor lines of the Tidal Canal and San Leandro Point Area as shown on Map, or Sheet, No. 5 (Plaintiff's Exhibit 12).

"The endorsement on the "Maps of San Francisco Bay, Cal., showing Harbor Lines Prepared by the San Francisco Harbor Line Board 1912", including Plaintiff's Exhibit 12, read as follows:

'WAR DEPARTMENT

"Washington, Jany. 20 1913.

"The harbor lines shown and described on the accompanying maps, viz: San Francisco Nos. 1, 2 & 3, and San Francisco Bay Nos. 1 to 7 inclus. are approved to supersede all harbor lines previously approved for the localities shown thereon.

ROBERT SHAW OLIVER

Asst. Secretary of War.'

"The harbor lines thus approved were revocable at will by the Secretary of War and were in fact revoked in 1929 by the Secretary of War, at which time they were changed by moving the pierhead lines back to the bulkhead lines so that thereafter said lines were coterminous with the property lines of the property adjoining the Tidal Canal.

"The area between pierhead and bulkhead lines as shown on Plaintiff's Exhibit 10 was made available for use by adjoining property owners at the pleasure of the plaintiff and without special lease of any kind as shown by the endorsement on the title sheet of Plaintiff's Exhibit 9 reading as follows:

'WAR DEPARTMENT.

"Washington, June 3, 1913.

'The owners of property abutting the lands included in the right of way acquired by the United States for the Oakland Tidal Canal shown on accompanying

Sheet No. 5 are hereby authorized and permitted to occupy, with open-work non-permanent structures for wharf purposes, the portions of the strip of U. S. property fronting their respective properties and situated between the pierhead and bulkhead lines approved Jan. 20, 1913, without special lease or charges of any kind, it being expressly understood that this permission is revocable at any time when this area may be again required for purposes of navigation and shall not be construed as a relinquishment of the Government title to the said right of way.

HENRY BRECKINRIDGE
Asst. Secretary of War.' "

V

That the fact set forth in paragraph XVI of "Findings of Fact" contained in "Findings of Fact and Conclusions of Law" in the above entitled action, which said fact reads as follows: "On September 28, 1939, the said County notified the United States that on December 31, 1939, it would cease to operate said Fruitvale Avenue Bridge and referred to the decision of *County of Alameda* v. *Ross,* 32 Cal. App. (2d) 135, 89 Pac. (2d) 460", should have read as follows:

"On September 28, 1939, the said County notified the United States that on December 31, 1939, it would cease to operate said Fruitvale Avenue Bridge and referred to the decision of *County of Alameda* v. *Ross,* 32 Cal. App. (2d) 135, 89 Pac. (2d) 460. Said County subsequently agreed to operate said Bridge until March 31, 1940, but in so doing it was agreed that said County waived no rights, expressly retained all rights it might have in the premises, and that the position of the County of Alameda in this suit was not to be prejudiced in any way by such operation. It was further agreed that should said County subsequently agree to operate said Bridge after March 31,

1940, or should said County in any manner continue to operate said Bridge, that said County would thereby waive no rights, but would expressly retain all rights it might have in the premises, and that the position of the County of Alameda in this suit would not be prejudiced in any way by such operation or by such extension or extensions of time."

VI

That the fact set forth in paragraph XVIII of "Findings of Fact" contained in "Findings of Fact and Conclusions of Law" in the above entitled action, which said fact reads as follows: "The Court, in the said case of *County of Alameda* v. *Ross, supra,* did not have before it the resolution of the Board of Supervisors of the County of Alameda of December 6, 1909", is incomplete and erroneous in that said fact is contrary to the evidence adduced at the trial and to the facts set forth in the stipulations of facts filed in said action and in that the Court should have found in lieu of said fact the following fact:

"The Court, in the said case of *County of Alameda* v. *Ross, supra,* did not have before it the resolution of the Board of Supervisors of the County of Alameda of December 6, 1909, but said resolution was incorporated in the resolution of the Board of Supervisors of the County of Alameda of November 10, 1913, which latter resolution was before said Court. The United States was notified by the District Attorney of the County of Alameda, as counsel for the County of Alameda, of the filing of said 'Petition for Writ of Mandate' in said action. Copies of all papers filed in said action by both petitioner and respondent, including the stipulation of facts and all briefs, were sent to and received by the United States Attorney in San Francisco during the proceedings and before the case was submitted."

VII

That the conclusion of law contained in paragraph I of "Conclusions of Law" contained in "Findings of Fact and Conclusions of Law" in the above entitled action, which said conclusion reads as follows: "That the County of Alameda and the United States entered into a valid, binding contract, as evidenced by the Resolution adopted by the Board of Supervisors of said County on December 6, 1909; by the License issued by the Secretary of War on September 3, 1910; and the Resolution adopted by the Board of Supervisors of said County on November 10, 1913", is erroneous in that said conclusion is contrary to the evidence adduced at the trial and to the facts set forth in the stipulation of facts filed in said action and to the law applicable to said evidence and said facts, and in that the Court should have concluded as a matter of law that the resolution adopted by the Board of Supervisors of the County of Alameda on December 6, 1909, the license issued by the Secretary of War on September 3, 1910, and the resolution adopted by the Board of Supervisors of said County on November 10, 1913, did not constitute a valid contract and that neither the County of Alameda nor the United States is now or has ever been bound thereby.

VIII

That the conclusion of law contained in paragraph II of "Conclusions of Law" contained in "Findings of Fact and Conclusions of Law" in the above entitled action, which said conclusion reads as follows: "That under said contract the said County of Alameda is obligated to maintain, operate, repair, or rebuild said Fruitvale Avenue bridge", is erroneous in that said conclusion is contrary to the evidence adduced at the trial and to the facts set forth in the stipulations of facts filed in said action and to the law applicable to said evidence and said facts, and in that the Court should have concluded as a matter of law that there

not being now and never having been a valid and existing contract between the United States and the County of Alameda, that the said County of Alameda is not now and never has been obligated to maintain, operate, repair or rebuild said Fruitvale Avenue Bridge.

IX

That the conclusion of law contained in paragraph III of "Conclusions of Law" contained in "Findings of Fact and Conclusions of Law" in the above entitled action, which said conclusion reads as follows: "The County of Alameda is now estopped to set aside its contract with the United States to maintain, operate, repair or rebuild the Fruitvale Avenue Bridge", is erroneous in that said conclusion is contrary to the evidence adduced at the trial and to the facts set forth in the stipulations of facts filed in said action and to the law applicable to said evidence and said facts, and in that the Court should have concluded as a matter of law that the alleged contract between the United States and the County of Alameda for the said County to maintain, operate, repair or rebuild the said Fruitvale Avenue Bridge is *ultra vires* and that the said County of Alameda is not now and never has been estopped to set aside the said alleged contract.

X

That the conclusion of law contained in paragraph IV of "Conclusions of Law" contained in "Findings of Fact and Conclusions of Law" in the above entitled action, which said conclusion reads as follows: "The County of Alameda had and has authority to operate, maintain, repair or rebuild the Fruitvale Avenue Bridge", is erroneous in that said conclusion is contrary to the evidence adduced at the trial and to the facts set forth in the stipulations of facts filed in said action and to the law applicable to said evidence and said facts, and in that the Court should have concluded as a matter of law that neither the County of

Alameda nor its Board of Supervisors now has or ever has had the authority to operate, maintain, repair or rebuild the said Fruitvale Avenue Bridge.

XI

That the conclusion of law contained in paragraph V of "Conclusions of Law" contained in "Findings of Fact and Conclusions of Law" in the above entitled action, which said conclusion reads as follows: "Congress had and has power to authorize the County to operate, maintain, repair or rebuild the Fruitvale Avenue Bridge", is erroneous in that said conclusion is contrary to the evidence adduced at the trial and to the facts set forth in the stipulations of facts filed in said action and to the law applicable to said evidence and said facts, and in that the Court should have concluded as a matter of law that the Congress of the United States has not now and never has had the power to authorize said County of Alameda to operate, maintain, repair or rebuild the said Fruitvale Avenue Bridge.

XII

That the conclusion of law contained in paragraph VI of "Conclusions of Law" contained in "Findings of Fact and Conclusions of Law" in the above entitled action, which said conclusion reads as follows: "The expenditures made by the County of Alameda to operate and maintain the Fruitvale Avenue Bridge were and are not gifts to a private corporation of public money prohibited by Section 31 of Article IV of the California Constitution", is erroneous in that said conclusion is contrary to the evidence adduced at the trial and to the facts set forth in the stipulations of facts filed in said action and to the law applicable to said evidence and said facts, and in that the Court should have concluded as a matter of law that the expenditures made by the County of Alameda to operate and maintain the Fruitvale Avenue Bridge are and always have

been gifts of public money or things of value to individuals and municipal or other corporations, prohibited by Section 31 of Article IV of the Constitution of the State of California.

XIII

That the conclusion of law contained in paragraph VII of "Conclusions of Law" contained in "Findings of Fact and Conclusions of Law" in the above entitled action, which said conclusion reads as follows: "The contract between the County of Alameda and the United States does not violate Section 18 of Article XI of the Constitution of California forbidding a County to incur any indebtedness or liability exceeding in any year the income and revenue provided for such year", is erroneous in that said conclusion is contrary to the evidence adduced at the trial and to the facts set forth in the stipulations of facts filed in said action and to the law applicable to said evidence and said facts, and in that the Court should have concluded as a matter of law that the alleged contract between the County of Alameda and the United States violates Section 18 of Article XI of the Constitution of the State of California, which said constitutional provision forbids a county's incurring any indebtedness or liability exceeding in any year the income and revenue provided for such year.

XIV

That the conclusion of law contained in paragraph VIII of "Conclusions of Law" contained in "Findings of Fact and Conclusions of Law" in the above entitled action, which said conclusion reads as follows: "The contract between the United States and the County of Alameda is not void for lack of mutuality", is erroneous in that said conclusion is contrary to the evidence adduced at the trial and to the facts set forth in the stipulations of facts filed in said action and to the law applicable to said evidence and said

facts, and in that the Court should have concluded as a matter of law that the alleged contract between the United States and the County of Alameda is void for lack of mutuality.

XV

That the Court erred in not concluding as a matter of law that the alleged contract between the United States and the County of Alameda was void for lack of consideration and that neither of said parties is now or ever has been bound thereby.

XVI

That the conclusion of law contained in paragraph IX of "Conclusions of Law" contained in "Findings of Fact and Conclusions of Law" in the above entitled action, which said conclusion reads as follows: "The contract between the United States and the County of Alameda is not void for uncertainty", is erroneous in that said conclusion is contrary to the evidence adduced at the trial and to the facts set forth in the stipulations of facts filed in said action and to the law applicable to said evidence and said facts, and in that the Court should have concluded as a matter of law that the alleged contract between the United States and the County of Alameda is void for uncertainty, both because of the cancellation clause contained therein and because of the ambiguity of its provisions.

XVII

That the conclusion of law contained in paragraph X of "Conclusions of Law" contained in "Findings of Fact and Conclusions of Law" in the above entitled action, which said conclusion reads as follows: "The courts of the State of California had no jurisdiction to determine substantial rights of the United States in County of Alameda vs. Ross, 32 Cal. App. (2d) 135; 89 Pac. (2d) 460", is erroneous in that said conclusion is contrary to the evidence adduced at

the trial and to the facts set forth in the stipulations of facts filed in said action and to the law applicable to said evidence and said facts, and in that the Court should have concluded as a matter of law that the judgment of the District Court of Appeal of the State of California in the matter of *County of Alameda* v. *Ross,* 32 Cal. App. (2d) 135, 89 P. (2d) 460, interpreting the statutes, constitutional provisions and case law of the State of California in regard to the powers and limitations of powers of boards of supervisors and counties and setting forth the substantive law of that State, is binding upon the United States District Court in the present action and that said Court is without authority to interpret said statutes, constitutional provisions and case law or to determine the said substantive law of said State contrary thereto.

XVIII

That the conclusion of law contained in paragraph XII of "Conclusions of Law" contained in "Findings of Fact and Conclusions of Law" in the above entitled action, which said conclusion reads as follows: "That the counter claim of the defendant County of Alameda be dismissed and said defendant County take nothing thereby", is erroneous in that said conclusion is contrary to the evidence adduced at the trial and to the facts set forth in the stipulations of facts filed in said action and to the law applicable to said evidence and said facts, and in that the Court should have concluded as a matter of law that the counterclaim of the defendant County of Alameda should be granted and that the United States is obligated to operate, maintain, repair and when necessary, to rebuild or replace said Fruitvale Avenue Bridge and that the County of Alameda is forever relieved, released and absolved of any obligation, liability, duty or responsibility in connection with the control, operation, maintenance, repair and rebuilding of said Fruitvale Avenue Bridge.

XIX

That the Court erred in not concluding as a matter of law that the alleged contract between the United States and the County of Alameda not specifying any time for which said County was bound to maintain, repair and if necessary, replace the Fruitvale Avenue, Park Street and High Street bridges, was contrary to public policy and void and/or that said contract being silent as to the time of its duration was substantially complied with after a reasonable time and/or that said contract having failed to specify the term for which the obligation was to continue, was terminable at the will of either party.

XX

That the Court erred in not concluding as a matter of law that equity will not enforce perpetual contracts or contracts which are uncertain as to the length of time of performance or compliance as to their terms.

XXI

That the Court erred in not concluding as a matter of law that equity should not decree specific performance of said alleged contract which is oppressive, unjust and unconscionable.

XXII

That the Court erred in admitting over the defendant County of Alameda's objection the report of G. H. Mendell, Major of Engineers, and others, dated at San Francisco, California, February 16, 1874 (Rep. Tr. p. 13).

XXIII

That the Court erred in refusing to admit in evidence the "Stipulation of Facts with Reference to Offer of Evidence by the Defendant, County of Alameda," together with Exhibit I attached thereto, which said exhibit contained a Statement of Motion for a New Trial on behalf of Defendant Alfred A. Cohen in the matter of *United States* v. *Crooks* (lodged March 21, 1940), which said exhibit set

forth the testimony of the witness Major G. H. Mendell given at the time of said motion in the matter of *United States* v. *Crooks, et al.*, which said testimony explained the report of the said Major Mendell of February 16, 1874, and set forth the details of the construction of said Tidal Canal and purposes for which said Tidal Canal was to be constructed and particularly the fact that said Tidal Canal was to be navigable.

XXIV

That the Court erred in refusing to admit in evidence the "Stipulation of Facts with Reference to Offer of Evidence by Defendant, County of Alameda," to the effect that Major G. H. Mendell, also known as George H. Mendell, Major of Engineers of the United States Army, referred to in the "Stipulation of Facts with Reference to Offer of Evidence by Defendant County of Alameda subject to Objection of Plaintiff as to Materiality" on file herein, was deceased prior to the commencement of this proceeding and during his lifetime was the same party named as defendant in the case of *United States* v. *Crooks, et al.*, which said Stipulation was lodged in the instant case on the 26th day of March, 1940.

XXV

That the Court erred in overruling the defendant County of Alameda's motion to strike from the record all testimony of the plaintiff's witness, Henry S. Pond, given on direct examination, which said motion was based on the ground that said evidence was incompetent, irrelevant and immaterial; that it did not involve any of the issues of said case; that it did not establish any consideration for the assumption of control by the County of Alameda of said bridges or any consideration for any alleged agreement between the said County and the United States Government, and that any such purported agreement between said County and said Government was void and illegal beacuse it was

beyond the power of the Board of Supervisors and contrary to the Constitution of the State of California in that it would constitute a gift of public funds to private corporations and an expenditure of public moneys in excess of the income provided for any one year (Rep. Tr. pp. 48-49).

XXVI

The Court erred in limiting the cross-examination of defendant County of Alameda of the plaintiff's witness, Henry S. Pond, in regard to leases by the United States Government of property along the Tidal Canal, to cross-examination concerning leases of lands lying between the High Street and Park Street bridges (Rep. Tr. 58-61).

XXVII

That the Court erred in ordering that judgment be entered in favor of plaintiff, The United State of America, on "Findings of Fact and Conclusions of Law" for the reason that said "Findings of Fact and Conclusions of Law" are each and every, all and singular contrary to the law and the evidence in the above entitled case and that, therefore, said decree is erroneous and should be set aside and said final judgment should be reversed and that the said United States Circuit Court of Appeals for the Ninth Circuit should order that judgment be entered for the defendant and appellant County of Alameda and that said defendant and appellant County of Alameda should have its costs expended herein.

Dated: February 17, 1941.

RALPH E. HOYT,
District Attorney in and for the County of Alameda, State of California,

J. F. COAKLEY,
Chief Assistant District Attorney in and for the County of Alameda, State of California,

ROBERT H. McCREARY,
Assistant District Attorney in and for the County of Alameda, State of California,

CECIL MOSBACHER,
Deputy District Attorney in and for the County of Alameda, State of California.

Attorneys for Appellant County of Alameda.

Service and receipt of a copy of the attached Statement of the Points on which Defendant and Appellant County of Alameda Intends to Rely on Appeal, is hereby admitted this 17th day of February, 1941.

FRANK J. HENNESSY,
U. S. Atty.
W. E. LICKING,
Attorneys for Appellee United States of America.

E. J. FOULDS,
Attorney for Defendants Central Pacific Railway Company and Southern Pacific Company.

[Endorsed]: Filed Feb. 17, 1941. Paul P. O'Brien, Clerk.

(Tr. 490-510).

IV.

RESOLUTION OF BOARD OF SUPERVISORS OF ALAMEDA COUNTY

December 6, 1909.

RESOLUTION OF THE BOARD OF SUPERVISORS OF THE COUNTY OF ALAMEDA, STATE OF CALIFORNIA, ACCEPTING PARK STREET, FRUITVALE AVENUE AND HIGH STREET BRIDGES.

Whereas, there exists in the County of Alameda, State of California, over and across the United States Tidal Canal, certain draw bridges commonly known as the Park Street Bridge and Fruitvale Avenue Bridge, and the High Street Bridge, all of which bridges were constructed over said canal by, and belong to, and are the property of, the United States of America; and

Whereas, no provision has ever been made for the operation of said bridges by the United States Government; and

Whereas, that portion of said canal between said bridges has never been open to navigation; and

Whereas, the requirements of commerce and shipping would be materially benefited by the operation of said bridges, and the opening of said canal to navigation in such manner as to permit the passage of vessels in said canal; and

Whereas, Lieutenant Colonel John Biddle, U. S. A., in his report upon the improvement of rivers and harbors in the First San Francisco, California Districts, has recommended that the bridges hereinbefore referred to, to wit, the High Street Bridge, Fruitvale Avenue Bridge and the Park Street Bridge be turned over to the County of Alameda, provided that the County of Alemada thereafter assume all cost of repair, operation and replacement when necessary; and,

Whereas, the Honorable Joseph R. Knowland, Congressman from the Third District of California, has succeeded

in securing the recommendation of the War Department that permission be given to turn these bridges over to the County of Alameda; and,

Whereas, the City of Alameda, acting by and through its regularly constituted authorities thereunto duly authorized, has agreed to supply electric power for the operation of said bridges hereinabove referred to for the period of five years, without cost to the said County of Alameda, now, therefore,

Be It Resolved that the County of Alameda, by and through its Board of Supervisors thereunto duly authorized, hereby agrees to accept said bridges, to wit: The said Park Street Bridge, Fruitvale Avenue Bridge and High Street Bridge and to assume all costs of future repair, operation and replacement of said bridges, provided that they and each of them be placed in such condition and repair by the United States of America, prior to such acceptance by the said County of Alameda, in the State of California, that said bridges, and each of them may be operated by electricity, and provided further that the United States shall, under such terms and conditions as it may see fit, lease the waterfront of the tidal canal and establish harbor lines so as to permit the construction of wharves and docks; and

Be It Further Resolved that a copy of this resolution be sent by this Board under seal of this Board to United States Senator George C. Perkins, Congressman Joseph R. Knowland, Lieutenant Colonel John Biddle, and to the City Clerk of the City of Alameda.

Passed and adopted by the following vote:

Ayes: Supervisors—Bridge, Foss, Mullins and Ch. Honrner. -4.

Noes: Supervisors—None.

Absent: Supervisor—Kelley.

I hereby certify that the foregoing is a true and correct copy of a Resolution adopted by the Board of Supervisors of Alameda, Cal., Monday, December 6th, 1909.

JOHN P. COOK,
County Clerk and Ex-Officia Clerk of the Board of Supervisors of Alameda County, Cal.
By H. M. WILSON,
Deputy Clerk
(Tr. 167-169).

V.

LICENSE

September 3, 1910.
J. A. G. O.
(27215)

Whereas, By the Act of Congress approved June 25, 1910, entitled "An Act making appropriations for the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes" (Public—No. 264), and under the clause of appropriation therein for "Improving harbor at Oakland, California", it is provided, *inter alia,* as follows:

"Provided further, That the three bridges heretofore built by the United States in connection with this improvement may be turned over to the local authorities to be maintained and operated by them upon such terms as to transfer and control as in the discretion of the Secretary of War may be equitable and just to the United States and to said local authorities;

"Provided further, That of the appropriation herein made so much as shall be necessary may be expended for such alterations and repairs to said bridges as in the discretion of the Secretary of War may be essential to meet the terms of said transfer.'

Now, Therefore, Under the authority and discretion in him vested by the above-quoted provision of said Act of Congress, and in accordance with the recommendation

of the Chief of Engineers, United States Army, the Secretary of War hereby grants unto the Board of Supervisors of Alameda County, California, a license, revocable at will by the Secretary of War, to assume control of the said three (3) bridges built by the United States in connection with the improvement of Oakland Harbor, California.

This License is granted subjejct to the following conditions and provisions:

1.—That the three bridges shall be freely open to all public traffic without charge, and that no exclusive privilege or right-of-way shall be granted to any street car or other traffic corporation, and in case two or more such lines or corporations shall desire to use the bridges, or any one of them, each shall pay its proportional share of the original cost and its share of maintenance of the track or tracks jointly used.

2.—That for the purpose of securing a compliance with the terms of this permit, the said three bridges shall be under the supervision of the Engineer Officer of the United States Army in charge of the Engineer District in which the bridges are situated.

3.—That the United States shall put all three bridges in condition for operation of their draws by electrical power, furnishing and installing new electrical machinery together with the necessary cables and wiring; furnishing bridge-tenders' houses and highway gates; and also overhauling all old machinery and putting it in good order for operation under the new conditions.

4.—That said Board of Supervisors shall maintain these bridges, attending to all necessary repairs, and rebuilding same if at any time burned, destroyed, or become inadequate for the purpose they serve.

5.—That said Board of Supervisors shall maintain the necessary number of bridge-tenders at each bridge to insure their draws being promptly opened and closed as required in the interests of navigation and street traffic.

Witness my hand this 3rd day of September, 1910.

(Signed)

JOHN C. SCOFIELD,
Assistant and Chief Clerk, for the Secretary of War, in his absence.

(Tr. 170-172).

VI.

RESOLUTION OF THE BOARD OF SUPERVISORS OF THE COUNTY OF ALAMEDA.

November 10, 1913.

Introduced by Supervisor .....

At meeting held Nov. 10, 1913.

Whereas, this Board of Supervisors, by resoultion heretofore adopted, agreed to accept certain draw bridges across the United States Tidal Canal in Alameda County, commonly known as the Park Street Bridge, Fruitvale Avenue Bridge and High Street Bridge, and assume all costs of future repair, operation and replacement of said bridges, provided that each of said bridges were placed in such condition and repair by the United States Government that said bridges, and each of them, might be operated by electricity, and that the United States should, under such terms and conditions as it might see fit, lease the water front of the Tidal Canal and establish harbor lines so as to permit the construction of wharves and docks; and

Whereas, subsequent to the adoption of said resolution, and on the 3rd day of Stepmber, 1910, the Srecretary of War, in accordance with the provisions of an Act of Congress, approved June 28, 1910, entitled "An Act making appropriations for the construction, repair and preservation of certain public works on rivers and harbors, and for other purposes" (Public No. 264), issued a license to the Board of Supervisors, revocable at will by the Secretary of War, to assume control of the said three bridges built

by the United States in connection with the improvement of Oakland Harbor, California, which said license was granted subject to the following conditions and provisions, to-wit:

1. That the three bridges shall be freely open to all public traffic without charge, and that no exclusive privilege or right-of-way shall be granted to any street car or other traffic corporation, and in case two or more such lines or corporations shall desire to use the bridges, or any of them, each shall pay its proportional share of the original cost and its share of maintenance of the track or tracks jointly used.

2. That for the purpose of securing a compliance with the terms of this permit, the said three bridges shall be under the supervision of the Engineer Officer of the United States Army in charge of the Engineer District in which the bridges are situated.

3. That the United States shall put all three bridges in condition for operation of their draws by electrical power, furnishing and installing new electrical machinery togther with the necessary cables and wiring; furnishing bridge-tenders' houses and highway gates; and also overhauling all old machinery and putting it in good order for operation under the new conditions.

4. That said Board of Supervisors shall maintain these bridges, attending to all necessary repairs, and rebuilding same if at any time burned, destroyed, or become inadequate for the purpose they serve.

5. That said Board of Supervisors shall maintain the necessary number of bridge-tenders at each bridge to insure their draws being promptly opened and closed as required in the interests of navigation and street traffic; and

Whereas, the United States has put all three bridges in condition for opration of their draws by electrical power, has furnished and installed new electrical machinery, together with the necessary cables and wiring, furnished

bridge-tenders' houses and highway gates; and, also, overhauled all old machinery and put it in good order for operation, under the new conditions as required by paragraph 3 of said License, and has performed all things required by it to be performed, under the terms of said License; now, therefore,

Be It Resolved that the Board of Supervisors of Alameda County, California, does hereby accept and assume control of the said three bridges heretofore built by the United States in connection with the improvement of Oakland Harbor, to-wit, the Park Street Bridge, the Fruitvale Avenue Bridge and the High Street Bridge, subject to the conditions and provisions of the aforesaid License of September 3, 1910, said acceptance being effective from and after Monday, November 17th, 1913.

Adopted by the following vote:

Ayes: Supervisors—Bridge, Foss, Kelley, Murphy and Chairman Mullins. -5.

Noes: Supervisors—None.

Absent: Supervisors—None.

I, John P. Cook, County Clerk, and ex-officio Clerk of the Board of Supervisors of Alameda County, State of California, do hereby certify that the foregoing resolution hereunto attached is a true and correct copy of a resolution adopted by said Board of Supervisors of Alameda County, State of California, on Monday, November 10, A. D,. 1913.

JOHN P. COOK,
County Clerk and ex-officio Clerk of the Board of Supervisors of Alameda County, California.
By H. M. WILSON,
Deputy Clerk

(Tr. 172-176).